DUBLIN: PRINTED BY ALEX. THOM & SONS, 87 & 88, ABBEY-STREET.

PREFACE.

I HAVE written the following pages as an Introduction to the History of Jurisprudence.

I have attempted to give an historical review of the great authors who have scientifically cultivated Law, combined with a sketch of its internal development. Some biographical details are added.

A great portion of the book is a compilation. Following the example of distinguished authorities, "I have taken whatever appeared most valuable from the works of former writers."

In a volume embracing so large a portion of human knowledge in one of its most difficult branches, I have necessarily been obliged to rely much upon the labours of my predecessors. I acknowledge my many obligations to the works of TENNEMANN, HALLAM, J. S. MILL, WHEATON, LERMINIER, and JANET.

D. C. HERON.

7, UPPER FITZWILLIAM-STREET, DUBLIN,
April, 1860.

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BOOK I.

PRINCIPLES OF JURISPRUDENCE.

"Οὐ γὰρ οἱ ἀκροαταὶ τοῦ νόμου δίκαιοι παρὰ τῷ Θεῷ, ἀλλ' οἱ ποιηταὶ τοῦ νόμου δικαιωθήσονται. Ὅταν γὰρ ἔθνη τὰ μὴ νόμον ἔχοντα, φύσει τὰ τοῦ νόμου ποιῇ, οὗτοι νόμον μὴ ἔχοντες, ἑαυτοῖς εἰσι νόμος. Οἵτινες ἐνδείκνυνται τὸ ἔργον τοῦ νόμου γραπτὸν ἐν ταῖς καρδίαις αὐτῶν, συμμαρτυρούσης αὐτῶν τῆς συνειδήσεως, καὶ μεταξὺ ἀλλήλων τῶν λογισμῶν κατηγορούντων, ἢ καὶ ἀπολογουμένων·"

Ἐπιστολὴ πρὸς Ῥωμαίους, cap. ii., 13, 14, 15.

"Not the hearers of the Law are just before God, but the doers of the Law shall be justified. For when the Gentiles, who have not the Law, do by nature those things that are of the Law, those having not the Law, are a Law unto themselves, which show the works of the Law written in their hearts, their consciences bearing witness to them, and their thoughts between themselves accusing or else defending one another."

St. Paul's Epistle to the Romans, cap. ii., 13, 14, 15.

BOOK I.

PRINCIPLES OF JURISPRUDENCE.

CHAPTER I.

INTRODUCTION: THE SOCIAL SCIENCES.

JURISPRUDENCE is the Science of Positive Laws.

It has been observed that Laws are by the public considered as something distinct from common life, and the common affairs of society—as a sort of intellectual Japan, all access to which is prohibited, and the coasts of which are guarded by the gloom of an inexorable exclusion. Yet, even Japan in our own time has been opened. And to one truly reflecting upon the nature of Laws, few subjects ought to be more interesting. The whole fabric of society rests chiefly on the Law. The social and political life in which we live, the freedom which we enjoy, all result from the labours of the wise and good in this department of human intelligence. And the science of Jurisprudence concerns not individuals, but the community. The pleasures of knowledge, the glories of the refined arts are known to few; Laws are praised or cursed by every fireside. Each nation lives in the cottage as well as in the castle; and unless the beauty of legislature and the excellence of statesmanship dwell in the feelings and condition of the common people, our Government acts like the Epicurean gods, who enjoyed their existence careless of humanity.

The object of a History of Jurisprudence is to exhibit the circumstances which have attended the establishment of existing positive Laws. But the exposition of

the dead laws which have been superseded is inseparably interwoven with that of the living laws which have superseded them. And in this investigation are furnished the great examples for the Art of Legislation.[1]

Bolingbroke has observed, that to enable one to take a commanding view of the field of Law and Legislation there are two principal vantage grounds on which it is necessary to mount—History and Metaphysics. The road is smooth and flowery to that vantage ground offered by History. There has been no want of those who have ascended to it, and taken post upon it. To that which belongs to the region of Metaphysics, the road is rugged and full of thorns. Few have attempted to gain it; fewer have succeeded in placing themselves in a position whence a view at once clear and extensive could be obtained.

Many of the definitions which I shall adopt may be controverted. They are attempts to give some precision and accuracy to the most difficult department of Social Science. Lord Bacon has said that civil knowledge is conversant about a subject which, above all others, is most immersed in matter the hardest to be reduced to axiom. Aristotle, in the Politics, condemns the pursuit of a delusive geometrical accuracy in moral reasoning. Still, the first principles of Jurisprudence are maxims of reason which pervade all human laws, and the observance of which is discovered by experience to be essential to happiness and security.

I have attempted to sketch an outline of the subjects and divisions of Jurisprudence, its limits and province.

The word Law, in its widest sense, is used to designate those natural principles which are incident to, and govern all things, animate and inanimate. The entire of physical nature is subject to certain laws—the laws of gravitation, of light, of heat. In the Institutes of Justinian, the term Law is extended to the instincts of animals, and natural Law is therein defined to be that which nature

[1] Bentham.

has implanted in all living things "For this is not proper to men exclusively, but belongs to all animals, whether produced in the earth, in the air, or in the water." Hooker says: "That which doth assign unto each thing the kind, that which doth moderate the force and power, that which doth appoint the form and measure of working, the same we term a Law." All nature obeys certain rules, and animals are governed by fixed instincts. The bee and the beaver have built for thousands of years with the same degree of perfection. The celestial bodies have from the period of creation rolled in their orbits, subject to the laws of matter. And the term Law, in its general philosophical sense, is no less applicable to the phenomena of mind than to the phenomena of matter. The processes of the mind are as uniform as the processes of matter. The mode in which the mind arrives at a conclusion is as fixed and unalterable as the mode in which an apple falls to the ground. But, in Jurisprudence, the meaning of the word *Law* is limited. Law is a rule of civil conduct prescribed and enforced by the State.

A Science is a collection of the fundamental truths concerning the same subject matter, arranged in methodical order.

Philosophy is the explanation of the phenomena of the universe. With the ancients Philosophy was the love of wisdom; with us it implies the search after truth. The objects of Philosophy are the discovery of what is true, and the practice of what is good.

The explanation of a phenomenon is the reference of the fact to be explained to some known principle.

The properties and motions of matter form the subject of Natural Philosophy and its sub-divisions; thus, the science of Astronomy treats of the laws which govern the heavenly bodies; the science of Mechanics treats of the laws of weight and motion.

Similarly, Mental Philosophy treats of the laws which regulate the powers, faculties, and affections of the human mind and its development.

Mental Philosophy has been divided into two parts ; one treats of man in his individual capacity, the other of man as a member of society. But these parts are divided by an uncertain line, and each encroaches upon the distinct province of the other. The first branch of Mental Philosophy discusses the individual mind, its intellectual as well as its moral and active powers, the faculties of the understanding and those of the will. The second branch of Mental Philosophy treats of the social development of the human race, and has been termed the Political Science, or the Social Science, or Sociology.

Moral Duties, Exchanges, and Laws are the three subjects of the Social Science.

Ethics, Political Economy, and Jurisprudence, form the three subdivisions of the Social Science.

Notwithstanding considerable progress has been made in some of the physical sciences, especially in Astronomy, still, of many common occurrences in nature, the laws are either unknown, or at least are not reduced to that precision to which science ought to aspire.

Prevision is the test of science. Few branches of knowledge as yet can bear that test. An eclipse may be predicted ; who shall foretell the hour of a revolution ?

But the possibility of a science which can treat of the laws of society is denied. Even in the nineteenth century our writers maintain the exploded doctrines of the ancient Sophists, and insist that, in the domain of Laws and Politics, there exist no laws of laws—*leges legum*. Mr. Hallam[1] says, " If it is meant that any systematic science, whether by the name of Jurisprudence or Legislation, can be laid down as to the principles which ought to determine the institutions of all nations, or that, in other words, the laws of each separate community ought to be regulated by any universal standard in matters not depending upon Eternal Justice, we must demur to receiving so very disputable a proposition."

[1] " Literature of Europe," Vol. II., p. 586, 3rd edition, 1847.

This passage is obscure. If the term "Eternal Justice" be intended to apply only to those principles of right which can be enforced in the most advanced state of society, then the doctrine is erroneous. Many things are right in one state of society which are wrong in another. Slavery appears to have been suited to some ancient systems, and not to have worked the horrors of Tennessee and Kentucky. Trial by Jury is adapted for a people, honest, fair-dealing, tolerant, and free; it does not produce unmixed good amongst a people divided into fanatical parties, hostile to one another, and who disregard the obligation of an oath for the purpose of acquitting their friends and convicting their religious or political enemies. Trial by Jury, although abstractedly right, cannot be introduced into every country. Slavery, although abstractedly wrong, cannot be at once abolished.

Similarly, Professor Sedgwick, in his discourse on the Studies in the University of Cambridge, says[1]—"If, in moral reasoning, it be mere mockery to use the language of abstraction, and to build up systems by trains of *a priori* reasoning, it is assuredly not less absurd to affect the forms of inductive proof in political speculation. Every political as well as every moral principle practically involves the determination of the will, and thereby becomes at once separated from that class of investigations in which we consider the immutable relations of physical phenomena." The various causes of obstruction to the progress of the scientific cultivation of Laws have been frequently enumerated. Modern jurists have fallen into confusion, vagueness, and obscurity of thought from not having distinguished at the outset Ethics or Morals from compulsory human law; and they have considered both under one general appellation. They have adopted a kind of *a priori* method of investigation, instead of the inductive method; they have assumed general principles, not warranted by actual observation of facts; they have invented systems of law and government by inductions

[1] 5th Edition, p. 81, London, 1850.

from careless or imperfect observation, or even by the mere force of imagination, and then adapted the facts of history to these ideal or fictitious systems.

However, it is a great step in the progress of science that the existence of laws is admitted in those operations of nature which form the subject of the physical sciences. But, even where men have the choice of different modes of action, certain consequences follow from adopting one course of action or the other. Nor are such laws observable merely in the conduct of the individual. They are more to be observed in the conduct of multitudes, and in the rise and fall of great nations, in the records of crimes, and the annals of justice. If one army be marshalled confusedly—if the general have no sympathy with his soldiers—if they do not obey him with promptitude, zeal, and fidelity, there will be but an unsuccessful campaign against the force where order, discipline, and enthusiasm prevail. Faith, labour, honesty, and perseverance have, as they always had, their power to elevate in the scale of humanity the men and nations which adopt them. God is great: His mercy and goodness endure for ever; the fertile lands smile in verdure beneath the heavens; the seed multiplies; the summer sun ripens the bountiful harvests; the Process of Life goes on; millions of the human race become more prosperous, better educated, better fitted to serve their Creator; others, by their own deserts, sink in filth and degradation. The words God, Liberty, and Truth, find a response in the hearts of men, even during the saddest days of Atheism, Despotism, and Dishonesty. "Neither is it the part of a well-regulated, but rather of a perverse mind to seek glory rather than practise virtue, and for one to desire to be crowned before he hath contended. In vain does one endeavour to rise to the height of glory who has not first been illustrious in virtue."[1]

Illustrations will occur to every student of history.

[1] St Bernard's Sermon on St. Victor.

At the present period of philosophy, therefore, it is not pretended that the Science of Society is in a very advanced state. It is easier for the Astronomer by observation to ascertain the rules of celestial mechanics—it is easier for the Geologist to discover the history of the earth's mutations, than for the Jurist to trace those circumstances in human affairs which guide men to truth in Politics and Laws. "The man of real science recognises more than the superficial observer the concord between physical and moral laws, between science and religion. Both come from one great source, and every step that we make in the investigation of the physical laws, and of their principles, ought to lead us only to a nearer and better acquaintance with those of the moral universe, and with the majesty and grandeur of Him who has wished to grant us the growing evidence of Himself and of his attributes, by allowing His works, perfect from the beginning, to be gradually unveiled and explained to our researches."[1] In all human probability, Sociology will be the last science to be perfected. Of its three component parts the domain of Ethics alone has been scientifically cultivated by the greatest intellects for a long period in history. But Adam Smith, late in the eighteenth century, gave the first great impulse to the study of Political Economy. Bentham and Savigny, names of very recent memory, have, in the present generation, analyzed and historied Jurisprudence.

Yet, though the Physical Sciences have been first cultivated with some degree of success, the study of the Social Sciences appears more important with regard to human progress. Most of the processes of nature, the subjects of the Physical Sciences, are beyond the dominion of man; and though he may be affected by their result, still he cannot control them. The earth sweeps through space round the sun, careless of the populations which it bears; the sun revolves round some distant and unknown centre of gravitation; the causes of light and

[1] Cardinal Wiseman.

heat are mysteries. The earth, with all its millions of the human race, inspired by Love, Genius, and Ambition, is in creation but a whirling speck of dust; and were it this moment to vanish into nothingness, its loss would be unfelt, unseen by the galaxies which throng the firmament. But most of the subjects of the Social Sciences are within our dominion; and with ourselves alone it rests whether we will use and combine the materials of civilization, or leave those materials unused, and remain in ignorance, poverty, and misery. "It would be clearly an inversion of the order which Providence has established were we to regard science and its progress as the essential basis of man's happiness and of society's, and the moral duties as merely secondary and subsidiary, instead of assisting that great and salutary principle which we must always keep inviolate, that the true and real basis of all human happiness is the observance of the moral law; while, science, literature, and art—every thing, indeed, that ennobles, every thing that engentles, every thing that makes more graceful, or touches with higher perfection human nature in the individual, or in any form of society—may be made, and ought to be made, subservient to its progress, and thereby to its perfection."[1]

It is, therefore, idle to declare an aversion to Political Science: in so doing, persons state their indifference to the happiness of mankind. It is true that the moral and legal sentiments of mankind are various in different stages of civilization. At the present day, in every country, all opposing parties, Conservatives and Progressists alike, contest the first principles upon which Political Science is founded; but a similar strife has occurred in the infancy of all sciences. What varied theories have existed in Astronomy! The boundaries between the virtue of Justice and the other virtues are not yet so distinctly defined as to fix the limits of compulsory law. Time will fix those limits. In legislation,

[1] Cardinal Wiseman.

the Historical and Analytical Schools have hitherto been opposed. But it is the business of Science to unite them. For actual legislation ought always to be a compromise between history and philosophy. Since all our external actions react upon our fellow-men, we ought to strive to regulate them according to the laws of human association, by the aid of those very Political Sciences which some persons despise. All legitimate interests are in harmony. And the healthful prosperity of one promotes the prosperity of all. The study of the Social Sciences will foster disinterestedness, sympathy, patriotism, enthusiasm for all that is good and great. Even if the study of the Political Sciences were prohibited, their practice could not for a single moment be suspended. There are nations in which the theory of Government has never been the subject of reflection or discussion; nevertheless they are governed. If, then, the Social Sciences be obscure, let us throw light upon them; if they be uncertain, let us endeavour to fix them; if they be speculative, let us establish them upon reason and experience.[1]

In every science the principles are natural and fixed. Very few principles as yet have been discovered in any science. There are natural and fixed principles of legal Right and illegal Wrong, as there are natural and fixed principles of Gravitation. If the laws of Exchanges were properly understood, legislative interference would no more attempt to control the rise and fall of prices than the rise and fall of the barometer, or of the tides. If the true principles of Jurisprudence were acted upon, absurd and wicked legislation would disappear.

The study of Jurisprudence is so intimately connected with its kindred branches of Sociology, that it is necessary to compare and define their several limits. The three Social Sciences, Ethics, Political Economy, and Jurisprudence, are so united that it is difficult to treat of their subjects without the equal assistance of the jurist, the economist, and the moral philosopher.

[1] Mignet.

The object of the Science of Jurisprudence is the discovery of the relations which ought to be established by the Positive Law, and the best means to enforce such relations.

The object of Political Economy is the discovery of the laws which regulate the exchangeable value of commodities, and the discovery of the best means to determine the distribution of wealth.

Thus, each science, as to its own subject matter, strives to attain the true objects of Philosophy, the Discovery of Truth, and the Practice of Good.

Many kindred branches of knowledge assist these studies. Of all the sciences which aid the progress of Sociology, the most important is Statistics.

Statistics is the science of social facts expressed in numerical terms. It is most intimately allied to the three Social Sciences. All have for their end the amelioration of the social state, in guiding by the light of an exalted reason, administrative and political powers; but the Social Sciences proceed with boldness into the most elevated region of speculative systems, whilst Statistics is a science of facts which, in rapid figures, enumerates the wants of nations, their daily progress, and all the fortunate or unhappy individualities of their destinies.

The science of Statistics aids the practice of the Social Sciences in detailing the population of a country, its fertility, its means of communication and defence. This science fixes the numbers of the army which guarantees the independence of the State. It assists in the just imposition of Taxes. It tells the quantity and value of the productions of Agriculture and Manufactures. It traces the progress of the National Education, which makes men better by enlightening them. It gives the details of the machinery and cost of justice. It traces the history and causes of diseases, and points out the true course for sanitary reform. It illustrates, by novel and exact truths, a crowd of objects which arise from day to day, agitate public opinion, and exhibit problems to be solved by the Social Science.

Working steadfastly at these subjects, wise men have developed the Social Sciences, and the human race has progressed in civilization. Civilization is that condition of social life possessed by a moral, educated, and wealthy community, enjoying public security and liberty under the protection of law. The first requisite of society is security. When property is not secure from foreign ambition or civil commotion, or from crime, accumulation cannot proceed, nor can wealth remain in that degree which is necessary to provide persons with the luxuries and decencies of civilized life. No one would till the earth unless under the certainty that a reasonable share of the harvest would be enjoyed by himself. No one would voluntarily live and work in that country which is continually ravaged by foreign armies. Public Liberty is as essential an ingredient of Civilization as Public Security or Order. By Public Liberty I mean freedom of discussion, freedom of action, including absolute personal liberty, a free press, and a representative government. Such liberty is enjoyed by England and the United States; such liberty is not enjoyed by Russia. But, wherever there is tolerable security, even without any high degree of liberty, morality, or knowledge, wealth may still accumulate. Thus, in China, Northern India, Egypt, and the fertile provinces of Asiatic Turkey, many of the inhabitants enjoy a considerable amount of wealth. Still, morality or the sense of Right is the essential ingredient of a high order of civilization, and exercises the most remarkable influence on the prosperity of nations, and their success in art and war. Facility of communication is also an important part of advanced civilization. A country cannot be considered united, nor can it possess the stability of centralized government, unless there be easy and ready means of communicating from the capital to the different parts of the empire. The Romans were well aware of this when they constructed the roads which remain to the present day memorials of the Roman greatness. But the recent triumphs of mechanical science have surpassed the rude

efforts of ancient times; and the railway, the steamboat, and the electric telegraph are among the most important agents in the diffusion of knowledge and the maintenance of freedom. In nothing, however, have the civilized nations of modern times more surpassed the civilization of the ancients than in the knowledge and education of the people. Hence it is reasonable to entertain a hope that our present civilizations will not be lost, like those of Egypt, Greece, or Rome. The first literary state was Athens, possessed of the little territory of Attica, containing a population inferior to that of some English and Irish counties. Although books then were enormously dear—and it is recorded of Plato that he once paid £300 for an indifferent volume—still there was in Athens a popular education of a high order. Thus, Homer and the Rhapsodists publicly recited their poems; the plays of Æschylus and Sophocles were performed in the presence of 30,000 spectators; the history of Herodotus was read at the Olympic games; the odes of Pindar were sung at Delphi; Æschines and Demosthenes addressed the people in the assembly; the glorious statues and temples of the Ionian race were another and a splendid part of their education. In Rome there was no popular literature. The military aristocracy encouraged the people in their warlike spirit by wild-beast shows and gladiatorial combats. The early Romans organized Government and War, but left Art for other races. The Northern conquerors of the Roman Empire despised learning. The great majority of their kings, counts, and dukes were unable to write their names. Their signature was a seal, *signum*, impressed on their deeds. In effect, the improvement of the mechanical arts, the invention of printing, and the general use of paper first rendered a cheap literature and popular education possible. There is a great difference between the first Gazette published at Venice, and the *Times* of the latter half of the nineteenth century. The first Gazette contained fragments of doubtful news; now, more than by any thing else in England, the people are educated by

the newspapers, that with such industry collect, and with such rapidity disperse, information every morning to the working intelligence of the empire. The education of the people is increasing every day among all the nations most advanced in civilization. It was even recently the fashion to discuss whether education ought to be extended to the people; but, whilst learned men discussed these things, the labouring classes have become comparatively educated, and are an element in society. And, by the aid of printing and the diffusion of education, one clever man can now speak to tens of thousands more than Demosthenes ever electrified in the popular assembly.

Such are the present prospects of civilization. It is plain that if the civilized nations of Europe and America were left to themselves, untrammelled by the feudal forms, and freed from despotism whether monarchical or demoratic, a long career of progress would be before us. But the same cause which has so often checked civilization for centuries may again devastate Europe. War is the greatest foe of Progress. War has often annihilated the most magnificent civilizations. Foreign aggression ruined Egypt. A foreign war destroyed Carthage; and the northern coast of Africa has never recovered from the devastations committed two thousand years ago by the Roman soldiers. Rome, by war, destroyed the Grecian civilization. The northern barbarians annihilated the Roman Empire. The Mahometans conquered the civilization which, under the Greek emperors, a second time arose on the banks of the Hellespont. In every country the ruins of lost civilizations appear destroyed by War.

As nations advance in knowledge and enjoy self-government, wars for the sake of mere conquest between states in the same stage of civilization become more difficult. A shopkeeper in London or Paris is unwilling to pay armies; and, personally, has more dislike to serve as a soldier than a Zouave, a Cossack, or a Croat. The United States of America, by the absence of a standing army, appear incapable of carrying on a foreign

war of aggression with a distant and powerful country. Foreign aggression is easiest when the strength of a nation can be wielded by one man under a military despotism. Such power was possessed by Attila. Such power is possessed by the three emperors of Europe, or, to speak more correctly, by the Governments of Russia, Austria, and France. The barbarian soldiery of Russia are now as fierce, ignorant, and savage as they were a thousand years ago; still they are not the rude spear-armed militia of Totila. Clothed from the looms of England, armed with Prussian muskets and spring-bayonets, skilled in the science of the French engineers and artillery, the Russian battalions crossed the Carpathians under Nicholas I., and in our own memory annihilated the representative government and the free institutions of the Magyar aristocracy.

The present system of the military empires of Europe leaves the most beautiful portions of the earth without representative government, either central or local—without freedom of thought—without liberty of the press—without that personal security which Englishmen have, that, on the trial where the Government prosecutes a political accusation, the judges shall be impartially chosen from the people themselves. Under these despotical systems the whole energy of the State is centralized in the metropolis, and the only check upon arbitrary power is the fear of assassination.

The project of perpetual peace was prominently brought forward by Kant towards the close of the eighteenth century. Some of the articles of his theoretical treaty of a perpetual peace are essential to study. One of the most important is the disbanding of those vast armies which now consume the wealth of the most powerful states. Standing armies—*miles perpetuus*—ought to disappear entirely with time. For these appearing always ready for the combat incessantly threaten other powers with war, and excite states to surpass one another in the quantity of their troops. This rivalry is a source of expense, which ends by ren-

dering peace more burdensome than a short war. National debts ought not to be contracted for the purpose of interests external to the State. This system of credit is a treasure always ready for war. The only security for the preservation of universal peace is in the freedom of the Constitution of each State. Where citizens are free and have in their own hands the government, they hesitate to declare against themselves the calamities of war; but where the subjects are not citizens, the sovereign and the governing classes having little to fear for their personal comforts, may declare war upon the most frivolous reasons.

The abolition of standing armies, the restriction of national debts, and the independence of representative constitutions are the only guarantees of peace.

CHAPTER II.

ETHICS IN RELATION TO JURISPRUDENCE.

Ethics is the Science of Moral Duties.

The purpose of the physical sciences throughout all their provinces is to answer the question, "what is?" They consist only of facts, arranged according to their likeness, and expressed by general names given to every class of similar facts. The purpose of the moral sciences is to answer both the questions, "what is?" and "what ought to be?" They aim at ascertaining the rules which ought to govern voluntary action, and to which those habitual dispositions of mind which are the source of voluntary action ought to be adapted.[1]

The possibility of erecting Ethics into a science can be consistently disputed by those only who question the veracity of that consciousness, which immediately shows to us the existence and operation of a moral faculty.

The arguments against the existence of a moral fa-

[1] Sir James Mackintosh.

culty are generally founded upon the gross insensibility to moral distinctions exhibited by uneducated children or savage nations; or upon instances of persons who, from various causes, have counted those things right which we deem wrong, or esteemed actions as praiseworthy which we regard with abhorrence. But such exceptional and anomalous cases are nothing to the purpose. When we are told of the absurdities and self-contradictions believed, or at least professed, by whole nations as certain truths—when we are reminded that children and uneducated peasants do not readily assent at first hearing to the very axioms of science, we are not apt to be greatly disconcerted by such cavils against the existence of reason. The case is similar with respect to imperfect or diseased manifestations of our moral nature. Moral blindness, if it really exist at all, is a phenomenon far too rare to be taken into account in the psychology of man. The goître is, indeed, a melancholy instance of the evil results of a depressing physical condition; the Chinese woman's foot displays remarkably the power of bad training; but the anatomist of healthy humanity does not describe goîtres and club-feet as our normal condition. Hume, who industriously traversed the history of our race to collect all the instances of aberration which have resulted from neglect or imperfect study of the moral consciousness, is constrained to conclude that the principles upon which men reason in morals are always the same, though their conclusions are often very different: and Dugald Stewart observes, no less beautifully than ingeniously, that the histories of human imbecility are, in truth, the strongest testimonies which can be produced to prove how wonderful is the influence of the fundamental principles of morality over the belief, when they are able to sanctify in the apprehension of mankind every extravagant opinion which early education has taught us to associate with them. Such are their opinions. Though the obscure character of psychological law, the influence of predominating passions, or the capricious action of human volition,

may interfere with the inferential process in morals—and though the peculiar difficulties by which the moral philosopher is embarrassed, arising from the unavoidable use of a terminology impressed with the laxity of colloquial language, may render futile the attempt to compete with the geometrician in the simplicity and lucidity of his deductions, yet his process is identical with the geometrical method. Could we, indeed, shut out human volition, and the action of disturbing fancies, mankind would no more differ about the conclusions to be drawn from the primary elements of Ethics than about the deductions from geometrical postulates and definitions. Nor are the moral sciences alone exposed to the uncertainty arising from disturbing influences. There are elements in meteorology and in the laws of the tides which are unaccountable, and for which allowance must be made in the calculations which compute their effects in any given instance. We are not, then, to relinquish, on account of these disturbing influences and great obstacles, the erection of an imposing group of moral sciences on grounds quite as solid as those which refer to the material world. We find a scientific basis furnished to Ethics in the laws of our moral constitution; their nature, value, and the truths guaranteed by them, can be determined only by inductive investigation—the common method of "The Athenian Verulam and the British Plato."

It is quite evident that Bacon meant his method to be applicable to psychology and morals as well as to physics; he expressly declares it.[1] In the one branch of philosophy as in the other there should be an orderly observation of facts, accompanied by analysis, or, as he expresses it, the necessary exclusions of things indifferent. This should be followed by a process of generalization in which we seize on the points of agreement. The only essential difference between the two lies in this, that in the one we take the senses, and in the other consciousness as our informant.

[1] Nov. Org. lib. I. Aph. 127.

The only question of any difficulty respecting an inductive treatment of morals seems to be this: Does such a treatment mean that there are no *a priori* or intuitive principles of moral guidance, which, instead of deriving their authority from experience, are fitted and intended to sanction experience? Does not such a procedure expose us to the danger of substituting empirical generalizations and accidental associations for necessary truths and eternal principles?—of confounding, like the Athenian sophists, an average morality with an absolute standard of rectitude?

This objection is based on a misapprehension of the scientific process. To identify ethical truth with vulgar credence, or to adjust it to the fluctuating standard which the popular market supplies in every age to the demands of each succeeding generation, would be fatal to the very idea of a real moral law. A series of facts brought forward to show the general acknowledgement among men of a moral truth, must be carefully distinguished from an induction of a physical law from facts observed. The principles operate *a priori*, and independently of experience; they cannot become known to us, or be employed as philosophic principles, till we have determined their nature, rule, and limits by methodized observation. The distinction between moral good and evil—the obligation to shun the evil and do the good—are laws which, like the laws of logic, man discovers in his own nature, and which have their origin in himself, as they have their application in his actual life.[1] Moral laws are put into a man's soul or mind as into a treasure or repository, some in his very nature, some in after actions, by education and positive sanction.[2] The moralist refers for judgment on the necessary truths he enounces, not to voluminous statistics, however undeniably useful such records may be as a definite expression of certain facts in our social economy, and entitled as they are to an intermediate place between morals and politics; he bids

[1] Guizot. [2] Jeremy Taylor.

the student descend into his own consciousness—the depths of his own personality—and observe what he finds there:—

"To search through all he felt or saw,
The springs of life, the depths of awe,
And reach the law within the law."

Mental laws thus inductively determined are henceforward to be regarded as primary principles, and are open at once to the sweeping range of direct deduction. And again, experience has its part, in which there is an immensity to be done, not in the way of invading the domain of the exact science, but in that of extending our knowledge of the facts to which it is to be applied. Where the science of intuitive morals ends, there the science of the experimentalist meets it; and by a process which modern logicians have named traduction we pass from one order of reasoning to the other, and complete a science of Ethics practically applicable to every detail of life. And thus a method, constructed after the aphorism of Bacon, secures to the experimental as well as to the purely rational element its own approximate value, assigns to each its own place, and shows how the two are inseparably united, and how they mutually confirm and illustrate each other.

"Alterius sic
Altera poscit opem res, et conjurat amice."

The preceding general views may be illustrated by the following passage from Kant:—"It is more particularly in the region of morals that Plato discovers his ideas. Moral truth rests upon liberty, and liberty is under the government of laws which spring from the reason itself. Whoever would rest the idea of virtue upon experience, and establish as a model that which can scarcely serve as an example in any important practical application, would render virtue altogether uncertain, make it dependent upon time and circumstances, and render the formation of any rules impossible. Every one, on the contrary, can see that if any person were held up to him as a model of virtue, it is only in him-

self that the true type exists, to which the proposed model might be compared, and, consequently, appreciated. Now, this type is the idea of virtue; the objects of experience may, indeed, serve as examples to show that what the reason demands is, up to a certain point, possible in practice; but the archetype itself is not there. Because a man never acts in accordance with the pure idea he has of virtue, it does not follow that the idea itself is a mere chimera; for it is only by means of this idea that moral judgments are formed at all; it is, consequently, the foundation of moral perfection, so far at least as this is possible, considering the obstacles which human nature presents, which are, however, indeterminate. The Republic of Plato has become proverbial as the expression of an imaginary perfection, which can only exist in a disordered brain; and Brucker ridicules the notion that a prince could never govern well unless penetrated by the theory of ideas. But, instead of throwing aside Plato's thought as useless, under the pretext that it is incapable of realization, would it not be better to attempt a development of it, and by renewed efforts draw it from the obscurity in which that excellent genius has left it? The obstacles arise less, perhaps, from the inevitable evils attached to human nature than from a neglect of these veritable ideas in legislation. There can be nothing more unworthy of a philosopher than to appeal to an experience which is acknowledged to be in contradiction to these ideas; for what would have been the experience itself if the institutions in question had been established under happier auspices, conformably to ideas, and if, instead, other ideas, gross and rude, just because they are derived from experience, had not rendered every good design useless? In all that has reference to the principles of morals, and legislation, where ideas alone render experience possible, Plato possesses a merit that is peculiar to him, and which we are prevented from recognising only because we judge according to empirical rules, whose value as principles is as nothing compared with that of ideas. In reference to ex-

ternal nature, experience may, indeed, furnish rules, since, in this case, it is the source of truth ; but in reference to morals, experience is the mother of illusion ; and it is altogether error to reason from that which is done, or attempt to limit it by laws which have especial reference to that which ought to be done."

"Powers depart,
Possessions vanish, and opinions change,
And passions hold a fluctuating seat:
But by the storms of circumstance unshaken,
And subject neither to eclipse nor wave,
Duty exists;—immutably survive,
For our support, the measures and the forms
Which an abstract intelligence supplies,
Whose kingdom is where time and space are not."

The historical method of inquiry has been recommended by some, as by Schleiermacher, with whom Ethics is an investigation of human nature in its forms and tendencies developing itself in history. It must be conceded that history supplies to Ethics its most valuable illustrations ; but as human action is always presented in history as a complex web in which good and evil are mixed together, it is needful to have a test to determine which is the one and which the other. We are thus brought back to the inductive investigation of man's moral constitution as the only method of constructing a scientific Ethics in reference to Jurisprudence.

A most successful illustration of this inductive treatment of moral phenomena will be found in the ethical writings of Butler :—"There are two ways," writes Butler, "in which the subject of morals may be treated. One begins from inquiring into the abstract relations of things ; the other from a matter of fact, namely, what the particular nature of man is, its several parts, their economy or constitution ; from whence it proceeds to determine what course of life it is which is correspondent to this whole nature. In the former method the conclusion is expressed thus—that vice is contrary to the nature and reason of things ; in the latter, that it is a violation or breaking in upon our own nature." Of the former method, the system of Clarke, that virtue is a conformity with the relations of things; and that of

Wollaston—that virtue consisted in acting according to truth, are the most eminent examples. These systems which were recommended by the intellectual spirit of the age in which they were produced, when the splendid discoveries of Descartes, of Leibnitz, and of Newton had so dazzled the mind of Europe, have now become obsolete. The latter procedure was universally employed by the ancient moralists; and Butler systematically applying it, "occupying the unassailable ground of an appeal to consciousness," has established, by reasons superfluously conclusive, not merely the existence, but also the authoritative character and the implicit sanction of the moral law. It is as invested with these majestic attributes of eternity, immutability, and universal authority that the greatest masters of philosophy and eloquence, both in ancient and in modern times, have loved to contemplate and depict the Moral Faculty. Thus Cicero says:—Right reason is itself a law congenial to the feelings of nature, diffused among all men, uniform, eternal, calling us imperiously to our duty, and peremptorily prohibiting every violation of it. Nor does it speak one language at Rome and another at Athens, varying from place to place, or from time to time; but it addresses itself to all nations, and to all ages, deriving its authority from the common sovereign of the universe, and carrying home its sanctions to every breast by the inevitable punishment which it inflicts on transgressors. Seneca says—There is a holy spirit throned within us, of our good and evil deeds the Guardian and the Observer. As He is treated by us, even so He treats us. Fenelon says—Le Maitre interieur et universel dit toujours et par tout les mêmes verités. Under the same aspect the moral law is presented by Kant, when he calls it the Categorical Imperative whose absolute rule is—Act according to a maxim which would admit of being regarded as a general law for all acting beings. And Lord Brougham says—There is a law above all the enactments of human codes—the same throughout the world—the same in all times—it is the law written by the finger of God upon the heart of man.

CHAPTER III.

POLITICAL ECONOMY.

Political Economy is the Science of Exchanges.

The bountiful earth, under the varying influences of soil and climate, produces different things useful and agreeable to man. In tropical climates nature turns every field into a garden; there trees of beautiful form bear rich fruits; there grow the shrubs from which we obtain our spices, and variegated flowers bloom in wanton profusion. The organic richness and abundant fertility belonging to such districts enable them to produce the luxuries of civilized life. Countries more temperate afford vines and wheat. Some places abound in iron and coal; others in gold and silver. All civilized nations require to exchange some of their own productions for those of others; and upon such exchanges does the very existence of civilized life depend.

Between one country and another obstacles exist—seas, mountains, rivers, forests. These things throw difficulties in the way of transit; and to facilitate the operations of commerce the ingenuity of man invents speedy and safe modes of conveyance. Canals are made, harbours widened, rivers deepened, navigation improved. Rapid steamers triumph against the winds; railways pierce mountains and cross seas. Here, Political Economy shows how absurd and inconsistent it is that states should undergo the greatest expense, by building magnificent railways to facilitate intercourse, and at the same time should check intercourse by commercial restrictions and taxes which artificially raise prices.

All the phenomena which occur in the free interchanges of the productions of one place for those of another, the rise and fall of prices, and the reasons for the respective values of commodities, all the questions connected with capital and labour—every thing relating to exchanges, it is the province of Political Economy to

investigate. No subjects can be more important; and the investigation of them upon sound principles, now proceeding in most of the civilized nations of Europe, must eventually produce important results on the commerce, the prosperity, the progress of the world.

At first, when this science began to be extensively cultivated, objections were made to it, on the grounds that wealth is not a proper subject for our study, for with it increase also corruption and vice. Persons have derived ideas of this kind from the early study of the Greek and Roman writers; the minds of classical students retain through life the ideas of Cincinnatus nobly poor, and the black broth upon which Leonidas and his Spartans lived. The Roman writers praised sumptuary laws, and declaimed with all the strength of their powerful language against the degeneracy of their fellow-citizens from the old Republican times, ere they knew the refined arts of Greece, or enjoyed the plundered riches of the East.

But no fatal union necessarily exists between national wealth and national corruption. Greece at the time of her greatest material prosperity flourished most in eloquence, in arts, and arms. The Netherlands, in the time of Charles V., were the most industrious and, for their amount of territory, the wealthiest nation in the world —they exhibited no want of devoted heroism, no want of fiery independence. France in modern times has obtained from a union of wealth with the national taste polished manners and refined luxury; but they have not been found to damp her heroism or enervate the national spirit. And although England, like ancient Tyre, has her merchants who are princes, her traffickers who are the honourable of the earth, she still sits very glorious in the middle of the seas, and enriches the kings of the earth with the multitude of her riches and her merchandize. We may banish, then, the idea that the abundant returns of industry, the fruits of genius, the boundless extent of commerce, the exuberance of wealth, and the cultivation of the liberal arts, are enervating to

the national spirit, or dangerous to the national liberty. Liberty depends upon the structure of the government, the administration of justice, and the intelligence of the people. It has little to do with wealth, or poverty, or soil, or climate.

The science of Political Economy is of recent origin.

In the first stages of society, wealth, in the present popular meaning, can scarcely be said to exist. The wandering tribes of savages live by hunting and fishing; their habitations are formed of the bark of trees; their wealth consists of the skins which they wear, their weapons of the chase, and their canoes. We see this phase of society exemplified at the present day among the American Indians.

In the progress of society, the next step to this is the pastoral state, in which tribes of men united under the patriarchal system of government, have flocks and live upon their produce. This state is now exemplified among the Tartars of Central Asia.

From this the transition to the agricultural state is easy, in which there are more opportunities for accumulating wealth, and in which civilization rapidly progresses. Next in history arise the civilized nations of antiquity of which we have authentic record.

In Egypt and many other oriental nations there was great wealth; but they laboured under the oppressive despotisms which exist there to the present day. The bulk of the population was in slavery. The government, owning all the land of the country, was enabled to compel the cultivators to labour, and then to deprive them of the produce. The Pyramids of Egypt have often been mentioned with wonder, as evidences of the greatness of that civilization which was able to leave such great memorials. To me, on the other hand, reflecting that they were raised by forced unpaid labour of thousands of miserable beings perishing at the task, they have always seemed to exhibit only proofs of the senseless vanity of tyrants, who dragged so many of their subjects together, and forced them unpaid to raise useless heaps of stones, when those unhappy persons would have been

better employed in building comfortable though perishable houses for themselves, and living there with their families.

In Egypt, the sacerdotal caste alone attended to intellectual affairs, whilst the rest of the population was sunk in ignorance. The entire system of castes was strictly enforced. These castes still prevail throughout the East; and the system this moment may be seen in full vigour in parts of India, where Brahmins and their children's children must be priests for ever—where the descendants of soldiers must always be soldiers—where none of the natives who live strictly according to the tenets of their religion can leave the trade or business which their fathers followed—where the miserable Sudras must be slaves for ever. This system in India originated in the worst of despotisms. Brutal oppression characterized the governing classes, grovelling superstition debased the rest. Let us trust that the civilization of the Western Islands may yet abolish the castes of India.

In modern civilized societies there are many examples of men of humble birth raising themselves to the highest position and the greatest fortunes. Under the ancient tyrannies it was impossible for the phenomena attending the free competition of capital and labour to arise—it was impossible for the principles of taxation to be discussed, since taxes were nothing but plunder taken by the powerful from the humble.

In these old times the universal reign of rapine prevented the study of the social sciences from flourishing; notwithstanding that some nations successfully cultivated Literature and the Arts. Things now only practised by the outcasts, were then the pursuits of the leaders of society. Thus, Homer introduces Nestor asking Telemachus whether he and his friends were pirates or merchants:—

> "Say, what the cause—why, traversing the main,
> Steer you from port to port in quest of gain?
> Or to and fro, like roving pirates stray,
> Who, injuring others, cast their lives away?"
>
> —*Odyssey*, *Book* III.

The writer evidently did not consider that profession dishonourable which now is punished by the rope, and for the destruction of which civilized nations now offer head-money for slain pirates.

Athens, in the time of Pericles, flourished in wealth; her poets and orators hold still a foremost place amongst the intellect of the world; her architecture is still a model for us; her art is still contemplated by all succeeding time with admiring despair. Rome, under the later Republic, and in the time of the Emperors, accumulated such wealth as London now can scarcely rival, and in Taste and Art surpassed the Paris of the Napoleons. Why, then, did not these countries cultivate the science which treats of the operations that bring the produce of one climate to another, and enable the inhabitants of any district enjoying a fair share of wealth to possess the luxuries of the most remote zones, without the discomforts attending their production? One reason was, the utter contempt with which trade was regarded by the classic times. The citizens of the ancient States, even those enjoying the highest degree of freedom, all despised trade. Those branches of commercial and manufacturing industry which have raised our modern civilization to so great a height, and without which it would at once disappear, were scorned by the warlike citizens of Greece and Rome. Plato excluded tradesmen from his Republic. Cicero, although in most respects so far in advance of his age, thought commerce only not very despicable—"haud admodum vituperanda." He says also, "I do not wish the same people to be the ruler and the carrier of the world,"—"Nolo eundem populum imperatorem, et portitorem esse terrarum." Yet it has been the boast of Venice, Holland, and England in succession to be the carrier of the world —portitor terrarum. The Romans prohibited commerce to persons of birth, rank, and fortune, and no senator was allowed a vessel larger than a boat sufficient to carry his wine, corn, and fruits.[1] The military aristocracy of

[1] Code 4, 63. 3. Livy, b. 21, c. 63. Cicero in Verrem.

Rome, without trade or commerce, sought wealth in the only manner which can take the place of production—plunder. The wealth of Rome was plunder taken openly from the countries successively overrun by the victorious Roman armies; the principal taxes by which in latter times the Roman government subsisted were tributes drawn from conquered provinces.

The very sense in which the word tributum came to be used, shows how unfair was this—one of the earliest taxes in Rome. It was called tributum, being paid by the thirty plebeian tribes instituted as has been supposed by Servius Tullius. It derived its subsequent meaning from being a partial tax, not paid by the patricians, and a badge of servitude upon the plebeians. I am aware that it is a moot-point amongst historians whether these tribes included the patricians or not; but I consider that the sense in which the word tributum came to be used finally is upon this question decisive.

The wealth of Rome was principally plunder drawn from conquered countries. As each partly civilized nation in turn yielded to the terror of the Roman armies, its wealth accumulated for centuries, was transferred to Rome and spent in a season. Whilst nations thus afforded plunder, Italy flourished in wealth, and was covered with the most magnificent public and private edifices. But when no more new countries could be overcome, and when the tributes could no longer be exacted from the inhabitants of the provinces, the resources of Italy were not sufficient to keep those magnificent edifices from mouldering to decay. The ancient world had within it the fatal principles of decay—the despotism of the government, the tyranny of the governing races, the slavery and ignorance of the masses of the people. The old civilization fell to pieces upon the invasion of the hardy barbarians of the North, and the dark ages for a time covered Europe with a cloud.

When Learning began again to be cultivated, and when the European Universities were founded, the old prejudice against trade and commerce still survived.

The Feudal System flourished. The principle of the Feudal System was, that a dominant race tyrannized over a subjected one. The feudal lords extorted from the serfs their property, and insisted on their labour without paying them for it. No man could possess the absolute property of the land. The greatest contempt was manifested for trade. Warriors, in the early ages, contemned the rights of property in all unable to protect themselves by arms. The very name of warrior signifies a robber in its origin ;[1] no nobleman or gentleman in the feudal times would sully himself by embracing any profession except that of arms—or the Church. As a proof of the great contempt for trade which once existed in England, now the first commercial nation upon the earth, the most lucrative and flourishing branches of trade there were permitted to fall into the hands of despised strangers, the Jews and Lombards. The Jews invented bills of exchange, without which or some similar documents the vast mercantile operations now based upon credit could not be conducted. The Lombards invented shipping insurances. In this state of society none of the phenomena could prominently appear which arise from the free distribution of property, and from the unrestrained competition of capital and labour. None would consider about the cheapest and best mode of taxation whilst taxes were the property of governing races, who consumed them all for their own benefit, and were careless about the welfare of the producers. War was then the great business of nations, and the attention of government in matters of taxation was directed merely to the most effectual means of raising the supplies to meet the expenses of continual warfare. The best statesman was he who raised most taxes with least trouble from the oppressed common people.

The great discoveries of the fifteenth century began to destroy Feudalism. The invention of gunpowder

[1] Sanscrit *hara*, war, *hari*, a warrior, from *hri*, to take by force.—*Hampson's Origines Patriciæ*, p. 145.

caused the castles and armour of the barons to be useless, by means of which they had been enabled so long to prevent and defy any general law of the realm, and to live upon the plunder of the poor. It was found that a regiment of labourers, disciplined for six months, and armed with the weapons introduced by this wonderful discovery were superior in the battle-field to the bravest knights, mounted on splendid horses, and clad in costly armour. But the new weapons were expensive; there, again, the wealth of the towns was of more use than the chivalry of the castles. The great invention of Printing diffused knowledge amongst all. The great geographical discoveries gave a new impetus to commerce, which, from its wealth and extended operations, began no longer to be despised. Slavery by degrees vanished from the whole of Western Europe. Thus, with the decline of the Feudal System arose that commercial and manufacturing spirit which is now beginning to be the great moving power of the world.

Once, therefore, that the settled conditions of modern society began to arise in Western Europe, the serfs, emancipated from the feudal system, were enabled to dispose of their labour at the price which they considered sufficiently remunerative for them; merchants, under the protection of the law, no longer feared that their property would be taken from them at the will of some baron; wealth rapidly accumulated; and some men, instead of working with their own capital, began to live upon the profits of their capital lent to others. In consequence, all the nice and complicated questions connected with capital, labour, wages, taxation, and the like, began to attract the attention of learned men, and from their studies and writings upon these important subjects has arisen the modern science of Political Economy. The origin of this science is cotemporaneous with the spread of modern civilization, the increase of commerce, the rise of public liberty.

And briefly reviewing the history of Western Europe, we may see that the march of civilization has been steady

and progressive. First, the serfs are emancipated, then trade becomes honourable, and from these conditions, combined with some others, has arisen the great middle class, displaying the highest social activity, and cultivating the greatest spirit of industry ever witnessed in the world. Having accomplished so much, the spirit of progress now directs its efforts to solve the social difficulties of society; and in this, one of its chief aids is the science of Political Economy.

Some have despaired of continual progress, and assuredly all over the earth we behold the ruins of lost civilizations. In Central America, amidst forests a thousand years of age, the traveller beholds ruins of statues and temples that rival the beauty of Athenian art, and the massiveness of Egyptian architecture. They lie, broken and defaced, memorials of great and civilized nations, whose very names ages ago perished from human memory. Babylon, Nineveh, Carthage, once were great cities, and now are either heaps of ruins or effaced from the earth. Still we may anticipate that progress shall have a long career; for though sometimes for centuries it has been interrupted, yet since the dawn of history there is evidence of its continuance. We behold upon the earth places like the impassable morasses of the Amazon, breathing forth devastating epidemics, and affording to the few creatures in human form that linger there the means of dragging on but a dull and joyless existence, without usefulness or dignity. Comparatively recent history informs us that when the Athenian civilization flourished, the greater part of Europe, and now its most flourishing and civilized part, bore the same character. When Pericles lived his glorious existence, those countries which, under the names of France and Germany, are covered with rich corn-fields and beautiful vineyards, and have produced so many great and good men, were disfigured with rocks and marshes, and were inhabited by savages inferior to the present New Zealanders. The rivers, which then formed noisome swamps, have been taught to keep their channels, and are covered with

steamers; the rocks are built into libraries and cathedrals; and the descendants of the savages who dwelt there have been brought under the dominion of Law, and into the habits of peaceful life. So also, in the North and South Americas, Australia, and the islands of the Pacific and Southern Oceans, savage life is everywhere being replaced by civilization.

It thus appears that there is a natural tendency in mankind to rise from barbarism to civilization; and it is gratifying to see that the means of subsistence are proportionably more abundant in a civilized than in a savage state. "Knowledge, security of property, freedom of internal and external exchange, are the principal causes which at the same time promote the increase of subsistence, and elevate the character of the people; restrictions on exchange and commerce, artificial barriers excluding the great majority of the community from the chance of social eminence, and above all, ignorance and insecurity of person and property, are the general causes which produce improvidence and misery."[1]

In the popular liberty, which has enabled so many men of humble birth in modern times to raise themselves to the high positions which they have adorned, we see the best proofs of the high character of our modern civilization. In the development of society civilized nations have arrived at that stage where commerce is free, where industry is honoured. The fruits of labour are protected by the law, its exertions are respected, and the contempt which its industrious energy received at the hands of the rude soldiers of ancient times, is now reserved for the idle.

The study of the social sciences has aided to produce these sentiments beginning to pervade the heart of modern society. I have always considered that the study of the social sciences, such as Jurisprudence and Political Economy, should form a part of the general education of all, the poorest as well as the richest in the land.

The sciences may be placed in two divisions. Some of

[1] Senior.

necessity need to be known only to those who practise them professionally. We all can enjoy the fullest benefit of the mechanical sciences notwithstanding our ignorance of them. Few are acquainted with the mechanism of the steam-engine, yet millions enjoy the benefits of railway travelling. But sciences, like morality, jurisprudence, medicine, and political economy, derive their efficacy, not from the knowledge concentrated in particular professions, but from the general correct knowledge of them diffused through the public; and these sciences have this striking peculiarity, that no one confesses his absolute ignorance of them. Every one every day practises morality, jurisprudence, medicine, and political economy, let them be good or bad—and they are often very bad. Hence arises the importance of general education upon these subjects. And as regards political economy, I may say there are no subjects more interesting than those about which this science is conversant. They are those which concern every individual in the community; they are those upon which, in a very great measure, individual and national prosperity depend. There is no one who does not buy and sell, who does not pay taxes, who does not employ labour or is employed. And there cannot be upon earth a study of more extended dignity and usefulness, more becoming to philanthropy and patriotism, than the requisite and practical reform of the social institutions of the country—the solution of the social difficulties of the day. It is right to cultivate this social knowledge. By the study of these liberal sciences we shall the more assist the diffusion of the sentiments now spreading throughout the world, and by means of which all enlightened men regard the human race, without distinction, as one family aspiring to one common aim—the development of the faculties with which they have been endowed. The Social Sciences are of no one country, they belong to the entire world. Those who cultivate them, though separated by distance and by language, yet understand one another. Fellow-countrymen in thought they form one vast intellectual society

of citizens of the world, pursuing the same end, the discovery of universal truth,—animated by one feeling, the patriotism of Civilization.[1]

I now proceed to give the definitions of the terms used in these pages, and which are at present generally received in Economical Science. They are taken principally from the works of J. S. Mill and Senior, and are the result of the labours of modern economists.

Wealth comprehends all those things which are transferable, limited in supply, and possess utility.

The constituents of wealth are Utility, Limitation in supply, and Transferableness.

Limitation in supply is the most important of all the constituents of Wealth, and has the greatest effect upon Value.

Value is the quality in any thing which fits it to be given and received in Exchange.

The intrinsic causes of the value of a commodity are those which give to it utility and limit it in supply. The extrinsic causes are those which limit the supply, and occasion the utility of the commodities for which it is to be exchanged.

Steadiness in value depends on the permanence of the intrinsic causes of value.

Senior states four elementary propositions of the science of Political Economy:—

1. That every man desires to obtain additional wealth with as little sacrifice as possible:

2. That the population of the world, or, in other words, the number of persons inhabiting it, is limited only by moral and physical evil, or by fear of a deficiency of those articles of wealth which the habits of the individuals of each class of its inhabitants lead them to require:

3. That the powers of Labour and of the other instruments which produce wealth may be indefinitely increased by using their products as the means of further production:

[1] Mignet.

4. That Agricultural skill remaining the same, additional labour employed on the land within a given district produces in general a less proportionate return, or, in other words, that though, with every increase of the labour bestowed, the aggregate return is increased, the increase of the return is not in proportion to the increase of the labour.

Production is the occasioning an alteration in the condition of the existing particles of matter, for the occasioning of which alteration, or for the things thence resulting, something may be obtained in Exchange. This alteration is a product.

Products are divided into services and commodities. A Service is the act of occasioning the above mentioned alteration. A Commodity is the thing as altered. The real limits to Production are the limited quantity and limited productiveness of land.

Consumption is the making use of a thing.

Productive Consumption is that use of a product which occasions an ulterior product. Unproductive Consumption is that use which occasions no ulterior product.

The instruments of production are Land, Labour, and Capital.

Labour is the voluntary exertion of bodily or mental faculties for the purpose of production.

Productive Labour is that which produces utility fixed and embodied in material objects. All other labour, however useful, is classed as unproductive.

Capital is wealth applied to reproductive employment.

The fundamental propositions as to capital are :—1st, Industry is limited by capital; 2nd, Capital is the result of saving; 3rd, All Capital is consumed; 4th, Capital is kept up, not by preservation, but by perpetual reproduction.

The advantages derived from the use of Capital are, the use of implements, and the division of Labour.

The whole annual produce of the country is divided into rent, profit, and wages. So Society is divided into the

three classes, Labourers, Capitalists, and Landlords, each class having a different instrument, a different conduct, and a different remuneration. Production takes place either under a monopoly or not under a monopoly.

Monopolies are divided into four kinds :—

1. A monopoly under which the monopolist has not the exclusive power of producing but exclusive facilities as a producer, which may be employed indefinitely with equal or increasing advantage. The illustration of this is a patent for manufactures.

2. A monopoly under which the monopolist is the only producer, and cannot increase the amount of his produce. The illustration of this is a vineyard, *e. g.*, Johannisberg.

3. A monopoly under which the monopolist is the only producer, and can increase indefinitely with equal or increasing advantage the amount of his produce. The illustration of this is copyright in books.

4. A monopoly under which the monopolist is not the only producer, but has peculiar facilities which diminish and ultimately disappear as he increases the amount of his produce.

The last is the great monopoly of land.

Wages are the reward of Labour.

The promixate cause deciding the rate of wages is the extent of the fund for the maintenance of Labourers, compared with the number of Labourers to be maintained.

The causes on which the extent of the fund for the maintenance of Labourers really depends are—1. The productiveness of Labour in the direct or indirect production of the Commodities used by the Labourers: 2. The number of persons directly or indirectly employed in the production of things for the use of Labourers compared with the whole number of labouring families.

The causes on which the productiveness of Labour depends are—1. The Corporeal intellectual and moral qualities of the Labourer : 2. The assistance of natural

Agents: 3. The assistance of capital: 4. The existence or the absence of Government interference.

The causes which divert Labour from the production of commodities for the use of labouring families are Rent, Taxation, and Profit.

Profit consists of the difference between the value of the advance made by the Capitalist and the value of the return. It is divided into three portions—Interest, Insurance, and the wages of Superintendence.

The facts which decide in what proportion the Capitalists and Labourers share the fund after the deduction of rent and taxation are two—first, the general rate of profit in the country on the advance of capital for a given period, and, secondly, the period which in each particular case has elapsed between the advance of the capital and the receipt of the profit.

The cause regulating the rate of profit is the proportion which the supply of capital employed in providing wages bears to the supply of Labourers.

The causes of variation in the amount of wages, and the rate of profits in different employments of Labour and Capital are assigned by Adam Smith:—1. Agreeableness; 2. Facility of learning the business; 3. Constancy of employment; 4. Trustworthiness; 5. Probability of success.

Money is the medium of Exchange, and is the measure of Value.

CHAPTER IV.

JURISPRUDENCE.

1. The term Jurisprudence has been used in very different senses. Originally it meant the science of Right. Afterwards it was used to mean knowledge of the principles of law, or skill in its practice. In the Institutes of Justinian Jurisprudence is defined to be the knowledge of what is just and unjust. Upon the revival of

learning in Europe in the sixteenth century, Jurisprudence was used to signify knowledge of the Roman Law. The term has also been used in a sense borrowed from the French to imply a collection of the principles belonging to particular branches of law—thus, Equity Jurisprudence, Maritime Jurisprudence. The term has also been used to signify the whole body of the law of a State—thus, the Jurisprudence of England.

The philological meanings of legal terms best illustrate legal history. There are three phases in the development of law—the religious, technical, and scientific. In the origin of society, every disputed question in law is referred to the decision of God. In all languages the legal terms of pleading causes originally imply the idea of prayer. Trials are by ordeal and by battle amongst all nations in an early state of civilization.

In the second phase of law, nations, by means of preappointed evidence and forms of a minute and cumulative nature, endeavour to attain certainty. Seven Roman Citizens were originally necessary to attest a Roman will. Under the English law, Twelve Jurors must unanimously find a prisoner guilty before he can receive punishment. Justice under such a system becomes minute and technical. The Judges often knowingly do what is unjust in carrying out the letter of the law. The maxim of this second phase is—let justice be done though the Heavens should fall—*fiat justitia ruat cælum.* Justice and the corresponding terms in this phase of law mean equality of division in all languages.

Finally, men begin to perceive that there are natural principles of Right and Wrong; and, in the third phase of law, endeavour to attain Truth and Justice by the aid of Reason and Experience.

Whilst the first and second phases prevail amongst a nation, Law cannot be scientifically cultivated. In the third phase the possibility is admitted of arriving at a complete Science of Law or Science of Right. In other words, the possibility is admitted of collecting and arranging in methodical order the fundamental principles

which explain the origin of laws and their development towards perfection. Some term is necessary to denote the Science of Law, and I shall so employ the word Jurisprudence. No science can be possibly developed without method, nomenclature, and classification.

"Nomina si pereant, perit et cognitio rerum."

Method facilitates comprehension, abridges labour, assists the memory, and trains the intellect to accurate judgment. In every species of knowledge, disorder in language is at once the effect and the cause of ignorance and error. Nomenclature can only be perfected in proportion as truth is discovered. The classification of laws has never yet been adopted upon the grand scale demanded by Jurisprudence. If a system of law were correctly framed, and if codes of laws were drafted on one true principle by all civilized nations, the language of each race would serve as a glossary by which all systems of positive law might be explained; whilst the matter in each code would afford a test and standard by which all might be tried. Thus classified and illustrated, the practice of every nation might be a lesson to every other, and mankind might carry on a mutual intercourse of experiences and improvements as easily in Law as in every other domain of Art and Science.

By Law is here understood Positive Law—that is, the law existing by position, or, the law of human enactment. Jurisprudence is the Science of Positive Laws, and, as such, is the theory of those duties which are capable of being enforced by the public authority. Jurisprudence, so treated, may take its place as one of those inductive sciences in which, by the observation of facts and the use of reason, systems of doctrine have been established which are universally received as truths among thoughtful men.

But Jurisprudence in its investigation of the origin, principles, and development of law, obviously furnishes rules which teach men to acknowledge and select good laws, to shun evil laws, and to practise the existing laws

and apply them skilfully. Hence, Jurisprudence is not only the Science of Positive Laws but is also the Art of Legislation and the Practice of Advocacy. A Jurist may state principles of law in his study, enact laws in the senate, or advocate rights in the forum.

A Science is a collection of Truths: an Art is a collection of Rules for Conduct.

The end of Science is Truth. The end of Art is Work.

Since Science is conversant about speculative knowledge only, and Art is the application of knowledge to practice, Jurisprudence, when applied to practice, whether in making of laws as in Legislation, or in the actual working of the law as in Advocacy, is an art; but Jurisprudence, when confined to the theory of law, is strictly a science.

The same term may be strictly applied to both the science and its corresponding art, as Logic is not only the Science of Thought but is also the Art of Reasoning. So, that I may give an example taken from the practice of the law: Conveyancing is the Science and also the Art of Alienation. If by an investigation of the laws of property we elicit and systematize the principles which govern its disposition, we are then forming the science. If we apply this knowledge in the alienation of property, we are skilful in the art.

The art may exist without the corresponding science having arrived at any degree of cultivation. If the knowledge applied to practice be merely accumulated experience, it is empirical; but if it be illustrated by history and philosophy, and brought under general principles, it becomes a science. Thus, Sir Edward Coke was an empirical lawyer; his writings are a chaos of ill-digested learning. Judge Story was a scientific jurist of a high class, who in his works rises from rules of practice to the principles of eternal justice.

In every age and country different laws produce different results, the same laws generally produce the same results. Observing, then, the actions of mankind differing in the different grades of civilization, it is possible to

estimate what rules for human conduct in civil society produce the most beneficial effects. If the physical sciences regard what is, and the mental sciences both what is and what ought to be; so the jurist, in the investigation of the Science of Right, should strive to make the actual law approach the Ideal of Legal Perfection.

2. Thus, Jurisprudence as an art, or Legislation, has the same ratio to Jurisprudence as a science which the rules of practical morality bear to the science of Ethics.

Bentham has correctly defined the limits between the provinces of Ethics and Jurisprudence. Ethics exhibit the rules of three classes of human actions; Prudence, Probity, and Beneficence. Legislation interferes directly by means of Punishment only. Punishment should not be applied when it is groundless, inefficacious, unprofitable, or needless.

The cases where the punishment would be unprofitable constitute the great field for the exclusive interference of Ethics.

Punishment as applied to Guilt may be unprofitable in both or either of two ways—by the expense to which it would amount even supposing it to be confined altogether to delinquency—or by the danger there may be of involving the innocent in the fate designed for the guilty.

Of the rules of moral duty those which stand least in need of the assistance of the legislator are the rules of Prudence. If one err in respect of Prudence, it must arise either from some inadvertence or misapprehension with regard to the circumstances on which his happiness depends. The rules of Probity are those which, in point of expediency, stand most in need of legislative assistance.

The idea of Right is the bond between Ethics and Jurisprudence. Practical Morality has been defined to be the art of directing the actions of individual men to the production of the greatest possible quantity of happiness by means of such motives as offer themselves. The Art of Legislation teaches how a multitude of men com-

posing a community may be disposed to pursue that course which is most conducive to the happiness of the entire community by means of motives which are applied by the Legislator. Ethics and Jurisprudence differ in the means which they employ. They coincide in one general ultimate end, the happiness of mankind by the regulation of human action.

The distinction between Ethics or the science of Moral Duties, and Jurisprudence, or the science of Positive Laws, is compulsion by public authority.

And thus discussing positive laws upon the inductive method—examining the different legislative systems of different nations, and their results upon the happiness of mankind—comparing slavery with freedom, ignorance with knowledge—accordingly as these have been checked or developed by the great forces which have swayed human destinies, we, by the observation of facts and the use of reason, selecting the good, eloigning the bad, may gradually arrive at that system of law which is most in conformity with natural justice.

But the duties of the jurist and the legislator are perfectly distinct. The business of the jurist is merely to state those general principles which are true in all times and under all circumstances. The legislator must regard the historical development of the people. And it cannot be too often repeated that all actual legislation must be a compromise between history and philosophy. No two nations ever existed having precisely the same standard of morality embodied in their laws. In no nation is the moral standard the same at different periods of its development. The law is always below the moral standard of the best citizens, and above that of the worst. The legislator must take heed that his legislation coincides with the public opinion of the mass, or the enforcement of a law becomes impossible. Thus duelling where the issue was fatal, was murder punished with death by the common law of England, but the law could not be enforced until late in the nineteenth century.

There is not in the whole compass of human affairs

so noble a spectacle as that which is displayed in the progress of Jurisprudence, where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages, withdrawing every case as it arises from the dangerous power of discretion, and subjecting it to inflexible rules of positive law.[1]

What can be more instructive than to search out the first obscure and scanty fountains of that Jurisprudence, which now waters and enriches whole nations with so abundant and copious a flood—to observe the first principles of right springing up involved in superstition and polluted by violence, until by length of time and favourable circumstances it has worked itself into clearness—to view the laws, sometimes lost and trodden down in the confusion of wars and tumults, and sometimes overruled by the hand of power—then victorious over tyranny, growing stronger and more decisive by the violence they have suffered; enriched even by those foreign conquests which threaten their entire destruction—softened and mellowed by peace and religion, and improved and exalted by commerce, by social intercourse, and that great opener of the mind, ingenuous science.[2]

3. Justice alone of the virtues can be enforced by the public authority. Jurisprudence considers what range of human actions may come within the cognizance of justice, and what rights are capable of being protected by the positive law. Gratitude and benevolence are virtues, but incapable of being enforced by legal means, whereas, if one citizen take the property of another, there is compensation or punishment, or both.

The true objects of the science of Jurisprudence are the knowledge of the legal relations which ought to be established by the Positive Law, and the ascertainment of the best means to enforce such relations.

These true principles of Jurisprudence are at the very base of the science of Politics; and the due ascertainment of the province of government is perhaps the most import-

[1] Mackintosh. [2] Edmund Burke.

ant question of modern times. But the province of government is solely concerned with those human actions which are capable of being enforced by the public authority. It is idle for a government to try to enforce those duties which are incapable of being enforced by it. Duties such as these are not easy of definition, but an idea of them may be obtained by an exhaustive process of reasoning.

There are certain virtues of exalted character which can be attained only by persons of the most splendid moral and physical organization, placed in circumstances where these innate qualities have been developed to the highest pitch of excellence. When Leonidas died for liberty and civilization in the pass of Thermopylæ, he performed a duty to mankind; but what law could enforce the self-devotion of which we read the famous examples in ancient history?

That I may take a recent example: During the battle of Paris in 1848, when the Archbishop of Paris advanced with the crucifix in his hand to meet the terrible Faubourgs St. Antoine and Marceau, careless about death provided he brought peace, he was performing a duty, but a duty incapable of enforcement. The most exalted virtues, exemplified in the great actions which ennoble humanity, are attainable by few, and are beyond legislation.

There is another class of virtues manifested in external action impossible to be enforced by legislative authority. Virtues such as these are less difficult to attain, and are more generally diffused, but still are abhorrent of compulsion.

Such is the virtue of benevolence.

Vincent de Paul devoted his life to the comfort of the afflicted. Las Casas toiled for years in the cause of the oppressed Indians. Howard visited all Europe, not to survey the sumptuousness of palaces or the stateliness of temples; not to make accurate measurements of the remains of ancient grandeur, nor to form a scale of the curiosity of modern art; not to collect medals, nor to

collate manuscripts; but to dive into the depths of dungeons, to plunge into the infections of hospitals, to survey the mansions of sorrow and of pain, to take the gauge and dimensions of misery, depression, and contempt, to remember the forgotten, to attend to the neglected, to visit the forsaken, and to compare and collate the distresses of all men in all countries.[1]

Nor is this exalted benevolence confined to such eminent persons. In our own time Florence Nightingale organized a band of Sisters of Charity, who braved pestilence in the distant hospitals of Scutari, that they might afford relief to the agony of our wounded soldiers. A name in the page of History, and the public thanks of a nation are great rewards for such services. But many abandon the splendour of a patrician life, the ties of family and home, and the luxuries of the civilization of the nineteenth century, in order, living an obscure existence, to console misery in the abodes of the poor. Benevolence, like friendship and gratitude, is beyond legislation.

Again, that we may proceed from the virtues which are shown in relations with other persons to those virtues which chiefly concern the individual—the law cannot enforce prudence, caution, self-control from vice, or a proper disposition in the expenditure of money. Within recent memory, in England, one gentleman spends £100,000 in supporting the Italian Opera for two seasons; another lavishes £300,000 on the Turf in a few years. But the State cannot assume with success the guardianship of fortune. Next to the Crown lands the worst managed property possessed by the English community is under the Receivers of the Court of Chancery. The law cannot enforce wisdom in managing one's own, or beneficence in dealings with others; such things must be left to the discretion of individuals, to the progress of education, and to the results of an enlightened public opinion.

So, Positive Law appears to be powerless against the vice of intoxication, and can only punish the wretched

[1] Edmund Burke.

drunkard who publicly offends against Decency and Order. The vice of drunkenness depends upon the will. In recent times two great aids have been discovered to assist the drunkard's will—the use of a limited period in abstinence, and sympathy or fellow-feeling in abstinence. The greatest drunkards can abstain from drink if the time of abstinence be definitely fixed so that they can look forward to a period when they can use their liberty again. Next comes the aid of sympathy. Men can do together and in company what they cannot do by themselves. Any thing that is difficult to do, any exertion of resolution, any kind of self-denial, is made easier by the aid of sympathy, by knowing that other persons are feeling and doing the same thing. Father Mathew and other leaders of the recent temperance movement in England and Ireland well understood this principle of human nature, when they organized the votaries of temperance into an army with medals, bands, and banners. But no law has ever been successful in preventing the vice of drunkenness.

Now, if it be impossible to enforce by public authority, first, the most exalted virtues; secondly, dispositions towards others, such as benevolence and friendship; thirdly, virtues belonging to the class of prudence and self-control, how much more impossible must it be to force the individual sentiments of the mind into the particular form ordained by any human law. Yet, in this last particular, how many governments have erred.

But the individual acts of the mind are independent. And belief of any thing rests upon the amount of evidence offered in respect of the fact to be proved and the natural capacity of the mind for judgment. Belief is independent of the will.

At present, by the universal consent of civilization, what is involuntary deserves neither reward nor punishment at the hands of the magistrate; but through the history of all nations, in the examples of religious persecution is seen the fearful amount of misery caused by persons invested with the supreme power attempting to enforce belief—a thing incapable of being enforced. And

this alone is sufficient to show the importance of ascertaining the province of Government—the importance of the science of Jurisprudence.

4. The end of Government is the Security of Rights. The natural rights of man are Life, Liberty, and Property. To protect these rights has been the professed and real object of all the systems of civil polity that ever illumined the world with a ray of freedom. These rights, in the first beginnings of civilization, are not only practically insecure, but, even in theory, are imperfectly acknowledged. Where slavery still exists these rights are imperfect. The aggressive wars of our own times show that the rights of strangers to their lives and property are not yet perfectly admitted by the civilized states in the world.

The theory of Hobbes is not wholly wrong, that, agreeably to the lowest law of Nature, man aims at the injury of his neighbour when a stranger to him. To savages all strangers are enemies; every thing unknown is an object of fear—Omne ignotum pro horribili. In all languages the same word originally signifies both stranger and enemy. But the more persons know one another, they generally love one another the more.

"Les hommes ne se haïront plus,
Quand ils s'entendent tous."

During the progress of civilization the sympathy of man for his fellow-creatures extends in an ever-widening circle. At first, none but immediate relatives are held entitled even to the common rights of life and property. Slaves are without rights. But in the advanced nations a poor law provides for even the outcasts of society; and humane legislation prevents cruelty to animals.

The first nucleus of society must have been the family, although nowhere in savage life has an isolated family been discovered unconnected with others by language or kindred. The existence of language proves that everywhere men exist in intellectual communities.

The family develops into the tribe. Men, whilst in the stage of the tribe, fanatically regard its interests beyond any thing else. They do not yet recognise the positive

rights of other men belonging to other tribes, to their lives, liberties, and properties. They do not hesitate to rob and murder persons even belonging to neighbouring tribes, speaking the same language, and having the same national origin.

Thus the Arabian tribes were engaged in mutual war before Mahomet for a time united them. The native chiefs of Ireland never ceased from their efforts at mutual destruction. The right of private war between the feudal barons was one of the most difficult to be abolished. The clans of the Scottish Highlands, up to the time of their disorganization, maintained the right of private war. The Indian tribes of North America still massacre one another when opportunity may offer. The petty nations of Northern Africa still are engaged in deadly mutual strife, scarcely interrupted by their common danger from the superior arms and civilization of the French.

Yet during this phase the tribes of the same race in process of time regard one another with less animosity than they regard persons belonging to other races. The Berbers of Northern Africa are sometimes mutually at peace, but towards Christians they entertain perpetual hostility. They rob and murder Christians whenever an opportunity may offer; nor do they perceive that they violate any natural right, or transgress any natural duty.

Sympathy develops from the tribe to the nation, and thence to the race. The word δήμος originally means parish; Democracy now means the government by a people. In ancient Greece, though piracy at first was not a dishonourable profession, the rights of all Hellenes were finally recognised; but the rest of mankind were still considered barbarians, perpetual enemies without natural rights to life, liberty, or property. The Roman Citizen united many nations, but warred upon the rest of the ancient world. The Proconsul in the Roman Theatre applauded the sentiment—"Homo sum, humani nil a me alienum puto," but he disregarded it in the foreign province. Still the acknowledgment of the rights of hu-

manity, and the consequent fusion of races, unceasingly proceed. In modern Europe the different States of France, once independent, have coalesced into one. The old kingdoms of Spain are now under one government. The British Islands, in which have existed such diversities of races and languages, are now a United Kingdom. Most of the Sclavonic races have coalesced under the empire of Russia. Whilst in present Continental politics the schemes of a German Empire—a United Italy—a Pansclavonic Confederation—are agitated by many ardent politicians.

Such is the development of Sympathy proceeding upon the more ancient idea of the bond of Union existing between family, tribe, nation, and race, both for aggressive and defensive purposes.

Another development of Sympathy, more based on Reason, arises from the recognition of the equal rights of all men as citizens of the world to share in the gifts of Providence. Commerce and Emigration are the two great agents by which in modern times the clannish distinctions of nation or race are obliterated.

Amongst the races of men whilst in an imperfect state of development, the tie of country is so strong that nothing but the most positive evils of war, pestilence, and famine, will compel them to abandon their native land. I take an illustration from my own time and country. The famine of 1846 loosened the hold of the Irish peasant upon the soil. From 1847 to 1855, yearly a greater Celtic emigration left Ireland than from Gaul one Brennus led to Rome, or the other to Greece. Yearly a greater multitude abandoned Ireland than in old times sufficed for a crusade. This flight of the Irish people surpassed any thing previously known and recorded of the migrations of the human family. It was caused by the failure of the potato and the repeal of the Corn Laws. The failure of the potato caused the famine. The repeal of the Corn Laws rendered the price of grain crops less at home, and increased the price of grain crops in the fertile virgin soils of North America.

No more deplorable condition could be imagined than that of the Irish-speaking peasantry who, by their ignorance of the English tongue, were cut off from civilization. They were worse lodged, clothed, and fed than the peasantry of any other civilized country, or even than the savage and heathen races in Central Africa. Their life was stagnant and hopeless misery. Their cabins were inferior to the habitations of any other human beings. Families slept in the same narrow chamber—at once a cause of disease, and an offence against good manners. The damp, the filth, the vitiated and corrupted vapours arising from want of drainage and ventilation, in periods of epidemics, caused a terrible mortality. In such pestilential abodes, the most robust constitutions were weakened; natures more delicate succumbed; generations were decimated, and the survivors languished through life enerved. The roofless walls of these miserable hovels are now seen all through Ireland, and I trust they will never again be roofed for human beings.

Emigration has, since 1847, emancipated two millions of these Celts from a state of pauperism in which they scarcely possessed the rights of men.

In civilized countries the poor may be divided into three principal classes. The first and least numerous is composed of those wretched beings who, from organic deformity, whether manifested in mind or body, are unable to earn their bread; with them may be comprised the aged and infirm. The next class is composed of the wicked and idle, who refuse to labour for their subsistence, and who, not possessing realized property of their own, are supported by the labour and charity of their friends. The third and most numerous class consists of the great masses of mankind, descendants of savages, who as yet have scarce emerged from primitive barbarism, and who, through ignorance of the methods of life, linger always upon the verge of starvation.

The last division includes the great majority of the poor in every country. In Ireland it is principally formed of the Irish-speaking peasantry, who for ages

have subsisted in the same state. Nor can it be said with certainty that the ancestors of these poor persons, in all their migrations from Irania through Europe to Ireland, during so many thousand years, were ever in a positively better condition.

Ignorance has been the great check to prevent the poor from emigration. Men rather bear the ills they have than fly to others they know not of. But the National Schools have dissipated much of old prejudice. Their friends in America, by transmitting £1,500,000 per annum to Ireland, have informed the Irish poor that beyond the Atlantic exists a continent where the same laws are better and more cheaply administered, and where there is plenty of good land to be had at a low rate. The more go, the more will go, until the rate of wages and the rent of land be the same in Illinois and Connemara.

It is difficult, perhaps not desirable, for one writing on a general theme to avoid the illustrations nearest to his own point of view. But the beneficial effects of the Celtic Exodus can scarcely be overrated by me. Through this emigration two millions emerged from primitive barbarism into the position of citizens. The next great advantage to the human family must spring from the fusion of races in America. The more the population is mixed the more prosperous will be the country. This result arises from the principle of the division of labour. Individual races excel in some qualities, and are deficient in others. The French, Italians, Germans, Sclaves, and English of the present day, each have their different qualities in which they severally surpass the rest ; and if they were fused into one community of United States, would each apply themselves solely to those departments of human skill and industry in which they are superior. This principle has long since been perceived, and termed the territorial division of labour. But it never can be completely developed whilst men remaining under different governments are separated by international tariffs, custom-houses, and wars.

In effect, pure races, like the Turks, languish and

become etiolated. The most flourishing communities, like the city of Romulus, have sprung *ex colluvione gentium*. In the mythical story of the foundation of Rome, Livy tells us that the founder opened an asylum for fugitives—the political refugees of the neighbouring petty states of Etruria and Latium. All the young men for whom Society in those states provided no employment, and who became its enemies in consequence, as naturally as the sparks fly upwards, fled to the protection of the seven hills of Rome. England has owed much of her greatness to being a similar asylum. Hither have fled the artisans of the Netherlands and France from the terror of the Duke of Alva and Louis XIV., whilst the modern Englishman is the result of the Celt, the Roman, the Saxon, and the Norman.

In thus mentioning different races I do not insist upon the intrinsic superiority of one race over another; nor do I use the term race to denote difference of origin. At the present time, certain aggregations of individuals have developed peculiar mental and physical qualities, and use different languages. So they are termed races. Some are at the height of prosperity; others in the lowest depths of degradation. The primitive causes of these things we know no more than the causes which have sunk Atlantic continents into the seas, and raised the Alps from the bottomless abysses of some primæval ocean. But St. Paul said at Athens, "God hath made of one blood all mankind to dwell upon the face of the earth." In the lowest Australian savage exists the germ of the intellect of Socrates, of Cæsar, of Bacon, of Napoleon. From the most unsightly Esquimaux at the Pole, or negroes of the Tropics, may, in the process of centuries be developed forms of god-like strength and beauty, like the living models of the Athenian sculptor. Even in recent memory, the splendid Magyar aristocrat came from Asia—a deformed Tartar savage—his language and origin the same with those of the Laplanders and Ostiaks. The Daco-Romans of Transylvania are the descendants of the Roman legionaries who conquered and colonized

the ancient world. But a thousand years of prosperity have changed the Magyar into one of nature's finest types of man; a thousand years of oppression have changed the Roumans into serfs, like those of the Hebrides, or of Kerry.

These two developments of Sympathy received an immense acceleration from the Russian war (1854-5). For the polished Athenian, for the Roman citizen, for the Feudal Lord, sympathy with mankind did not exist. But the inhabitants of England and France were not merely united by self-interest with the barbarians of Bulgaria, Armenia, and Circassia; they sympathized with them, and, for the sake of aliens in language and religion, sacrificed their blood and treasure, although the power of the Czar need not be feared by the Civilization of the West. This war against Russia was the first war undertaken by civilized nations ostensibly in defence of Abstract Right, where their own interests were not immediately concerned.

The stage of civilization at which no nation has yet arrived—to which all nations have a slow but certain tendency, is that in which men shall entertain the same sympathy towards all mankind which has been felt by them for family, tribe, nation, race—in which the crime of killing a stranger in aggressive war shall be regarded as murder is now regarded;—in which the liberty of the individual shall be completely developed,—and in which the absolute power of individual governments disappearing, men, true citizens of the world, shall possess over the earth their rights, and by the Law the means of enforcing them.

> "Self-love but serves the virtuous mind to wake,
> As the small pebble stirs the peaceful lake;
> The centre moved, a circle straight succeeds;
> Another still, and still another spreads.
> Friend, parent, neighbour, first it will embrace,
> His country next, and next all human race.
> Wide and more wide the o'erflowings of the mind
> Take every creature in of every kind;"[1]

[1] Pope.

The word patriotism now expresses the highest idea of sympathy which men can entertain. A patriot is honoured; a national feeling is applauded. But the time will come when the word national will be used as the word provincial is now used, to designate a narrowness of thought incompatible with a true appreciation of the destinies of mankind.

Still, although all human races upon the earth are in a state of progress tending towards the same legal civilization, there need be no apprehension that the nations of the world will so fall into one sink of level avarice. The gifts of nature are variously scattered amongst the children of great national families, and the brilliant variety of genius, taste, and imagination in races constitutes the splendour of mankind. The types of nationalities disappear with difficulty, and there is in nature one uniform variety. Grandeur and beauty would vanish from the earth if it were smoothed into level plainness. As the soldiers of all civilized nations use the same arms, the rifle and the bayonet, so once that the laws shall be discovered under which we best may live in happiness, all nations in a similar state of civilization will adopt them. But the glorious diversity of mankind must ever still proceed.

5. Jurisprudence embraces a great portion of what has been considered by various writers under the heads of Ethics, Polity, Political Philosophy, and Political Economy. Writers on political economy, in particular Adam Smith and John Stuart Mill, have discussed in their economical works many of the subjects of Jurisprudence. But Political Economy is only the science of exchanges. It has developed the great principle that exchanges should be free. Political Economy, starting from this principle, teaches as its corollaries that the permanent and regular increase of human comfort is grounded upon the absence, so far as depends on law, of all favoured classes, professions, and pursuits; in the equal protection afforded by the law to every citizen, and the unrestricted liberty of spending as he pleases his honest earnings. It teaches

that the machinery of trade and commerce should be left free; that every system of restrictions or prohibitions on commercial intercourse cuts off the foreign market, diminishes the number of our buyers and the demand for our produce, and so checks production. It teaches that all men should be permitted, without the interference of their government, to produce whatever they consider it most to their interest to produce; that they should not by laws be prevented from producing one thing, or by laws be bribed to produce another; that they should, so far as is consistent with public morality, be left alone, and allowed to follow their own interests as they please.

But Law has been only recently illustrated by its kindred sciences,—very recently the existence of a science of Society has been suspected,—but recently has Political Economy or Jurisprudence been taught in the universities of the United Kingdom of Great Britain and Ireland. However, the general progress of society has told upon the progress of Jurisprudence in the British Islands. Our Criminal Law has made wise and merciful progress from the time when trial by ordeal and battle existed,—from the time when mute prisoners were pressed to death,—from the time when Sir Edward Coke prosecuted Sir Walter Raleigh,—from the time of Chief Justice Jeffrey's bloody western assize,—from the time when prisoners were not allowed counsel to speak in their defence. So from the period when Lord Mansfield presided in the King's Bench, the doctrine and practice of our Commercial Law have been rapidly extended and improved. From the reign of William IV. the Law of Real Property in England is undergoing a process of wise and beneficial reform. Independently of legal science, the progress of the nation in wealth and the arts introduces new species of property, and necessitates cheap and expeditious forms of procedure.

Still science aids the progress of society, and a knowledge of law is incomplete without the knowledge of what Bacon terms the laws of laws—leges legum. As Sir

Edward Coke says, the reason of the law is the life of the law—for although a man can tell the law, if he knows not the reason thereof he shall soon forget his own superficial knowledge. But when he finds the right reason of the law and so brings it to his natural reason that he comprehends it as his own, this will not only serve him for the understanding of that particular case, but of many others. The knowledge of law is complicated. To know is properly to understand a thing by reason, and through its causes:—Cognitio legis est copulata et complicata. Scire autem est proprie rem ratione et per causam cognoscere.[1]

It has been maintained by many that politics and laws cannot be reduced into a science: the ancient sophists were of opinion that there were no such things as Right and Wrong by nature, but only by convention. That which appears just and honourable for each city is so for that city so long as the opinion is entertained, was one of their maxims. The opinions of the sophists may have been exaggerated by their great opponent Plato, still I believe they did protest energetically against the possibility of metaphysical science, whilst Plato against them maintained in the doctrine which Pope has poetically translated:—

> "All nature is but art unknown to thee;
> All chance, direction which thou can'st not see;
> All discord, harmony not understood;
> All partial evil, universal good;
> And spite of pride, in erring reason's spite,
> One truth is clear—whatever is, is right."

The possibility of metaphysical science, and, in particular, of the complete development of a science of law and government, is now admitted. The great system of Jurisprudence, says Sir William Jones, like that of the universe, consists of many subordinate systems all of which are connected by nice links and beautiful dependencies, and each of which is reducible to a few plain elements. If law be a science, and really deserves so

[1] Co. Litt.

sublime a name, it must be grounded upon principle, and claim an exalted rank in the empire of reason; but if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity may be lessened; and he will become the greatest lawyer who has the greatest natural or artificial memory.

So Edmund Burke has said that we are all born in subjection—all born equally, high and low, governors and governed—in subjection to one great immutable and predestined law prior to all our devices, and prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected with the eternal frame of the universe out of which we cannot stir. And he has described the science of Jurisprudence as the pride of the intellect, the collected wisdom of ages, combining the principles of original justice with the infinite variety of human concerns.

So also Vico considered that the development of society, like the heart of man, was subject to one constant, universal, and divine law; the variable application and progress of which depended upon the uncertain will and erring nature of man; and he hence conceived the hope of discovering the eternal principles of the natural law.

In Jurisprudence, a law properly so called, is a rule of conduct addressed to creatures capable of feeling an obligation by means of reason; or a law may be defined as a general command given by one intelligent being to another.

St. Thomas Aquinas defined law as a certain rule and measure according to which any agent is led to act or restrained from acting:—Lex est quædam regula et mensura, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur. This definition is plainly too indefinite and extensive. Suarez gives another description, and says, a law is a certain measure of moral acts of such a kind that by conformity to it they are morally right; by discordance with it morally wrong:—Lex est mensura quædam actuum moralium, ita ut per confor-

mitatem ad illam rectitudinem moralem habeant, et si ab illa discordent obliqui sunt.

Up to the present time four great divisions of Law have been enumerated by jurists:—Divine Law, Natural Law, International Law, and Positive Law.

With the pagan philosophers, following Plato, the divine law was the sovereign reason existing in the mind of God.

The doctors of the middle ages termed this principle of nature the Eternal Law. The Divine Law, with Plato, is the governing reason existing in the mind of the Universal Deity, which Theologians also acknowledge, but call the eternal law. Lex ergo divina apud Platonem est ratio gubernatrix universi in Dei mente existens, quam legem etiam Theologi agnoscunt sed legem æternam appellant.[1]

The Positive Divine Law is that which has been immediately promulgated by God. Lex positiva divina dicitur, quæ ab ipso Deo immediate lata est et toti legi naturali addita.[2] Our duty as to the Divine Law is simply to know it and obey it.

The Natural Law, according to Grotius, consists in certain principles of rectitude of reason which enable us to know whether an action is morally right or wrong according to its congruity with a reasonable and social nature. Jus naturale est dictatum rectæ rationis indicans actui alicui, ex ejus convenientia vel disconvenientia cum ipsâ naturâ rationali, inesse moralem turpitudinem aut necessitatem moralem, et consequenter ab auctore naturæ ipso deo talem actum aut vetari aut præcipi.[3] The Natural Law is thus considered under two aspects; first, its nature and essential qualities; secondly, its obligatory force.

Grotius compiled this definition from the previous authorities. But in Jurisprudence it can scarcely be adopted as correct. This definition of Natural Law em-

[1] Suarez, De Legibus, lib. 1. c. ii. sec. 6. [2] Ib. lib. 1. c. iii. sec. 14.
[3] Grotius, De Jure Belli et Pacis, lib. 1. c. 10.

braces the whole sphere of both moral and legal duty. In Jurisprudence, however, Natural Law cannot include so wide a circle. It only includes the rights and duties capable of being enforced by the power of the State.

It is most important in legislation to avoid intermeddling with the peculiar province of Ethics or Divinity. The Divine Law is the province of the Theologian, Ethics of the Moral Philosopher. Neither uses the compulsion which it is the province of the Legislator to employ.

Natural Law may accordingly be correctly defined as the theory of that part of our duties which, in reason and equity, is capable of being exacted.

On the other hand, if Jurisprudence be viewed as only one branch of the Social Science whose object is to ascertain the great natural law of the progress and development of society, and according to what laws men may best live in happiness—then Jurisprudence may be held to include the entire domain of the rights and duties which come within the province of Positive Law, Ethics, and Theology. The definition of St. Chrysostom might then be adopted that natural law is the instinctive knowledge of good and evil, *αὐτοδίδακτος ἡ γνῶσις τῶν καλῶν, καὶ τῶν ὀν τοιούτων.* As civilization proceeds, Jurisprudence continually encroaches upon the kindred sciences, and embraces an ever-widening range of social rights and obligations. I repeat an illustration. In the early ages of society human slaves have no rights. In modern times animals are recognised as having a right to good treatment, and cruelty is punished by the Positive Law.

The purposes of laws were distinguished by Modestinus:—to command, to forbid, to permit, or to punish.

The laws rendered effectual by rewards were defined to be of two species: first, those the object of which is to induce men to do something which all men are unable to do, such as those which offer a reward for scientific inventions; secondly, those laws the object of which is to make men more vigilant in the performance of legal duties, or in the enforcing of other laws,—such as laws offering rewards for the detection of offenders.

The civilians attempted to point out the laws made by States not conformably to the Law of Nature; thus, slavery was described as an institution of the Law of Nations contrary to the Law of Nature. Domat, following the civilians, has divided all laws into immutable, and mutable, or arbitrary. The former are defined as those which, being principles of the Law of Nature, cannot be changed without violating those natural obligations upon which the order of society is founded; the latter are defined as those which are not principles of natural law, and which, as they are not essential to the obligations in which society is founded, may be changed without violating those obligations.

These definitions are erroneous. In one stage of society slavery is as natural as freedom in another stage. In barbarous countries order cannot be maintained without a despotism impossible in free countries. Tyranny is equally the result of the natural law of one stage of society as Liberty is of another. The Problem of Society is to combine Order with Freedom. According to a natural law, society appears to progress from barbarism to civilization; and to assist that progress the social sciences contribute their aid by ascertaining under what positive laws men in their present stage of civilization best may live in happiness.

There have been thus two principal definitions of natural law. The Institutes define natural law as that which Nature has taught to animals; for this law belongs, not to the human race alone, but to all animated beings which are produced in the heaven, the earth, or the sea.[1] This is erroneous, because in Jurisprudence nothing can be properly called a law, except a rule of conduct addressed to, and binding on, creatures capable of feeling an obligation by means of reason. Cicero, on the other hand, says—Ex qua illa lex quam Dei humano generi dederunt recte est laudata; est enim ratio mensque sapientis ad jubendum et ad deterrendum idonea.

[1] Institutes of Justinian, lib. i. title 2.

The definition of Justinian is not a legal definition, but one which might be placed as an axiom for any science. But, again I repeat, Natural Law, legally defined as a subject of Jurisprudence, is the theory of those duties capable of being enforced.

The fundamental principle and starting point of natural law is the natural equality of the rights of all men. But in society this theoretical equality is speedily destroyed by the diversity of their respective and reciprocal duties and rights, as members of families, as reasonable beings living under the social state, and as having voluntarily entered into and contracted obligations with one another by express or tacit consent.

The Natural Law includes all the principles of Right common to just men living in civilization. And the doctors of the middle ages, accordingly, have defined Natural Law as the principle in the human mind by which the just is discerned from the unjust. Thus, Suarez says:—The Natural Law which pertains to moral philosophy and theology, is that which is seated in the human mind to distinguish good from bad.—Lex ergo naturalis propria quæ ad moralem doctrinam et theologiam pertinet, est illa quæ humanæ menti insidet ad discernendum honestum a turpi.[1]

Positive Law is the law of human enactment. It is called Positive as existing by position. For hence it is called Positive as it were added to Natural Law not necessarily flowing from it. Whence by some it is called fixed law.—Inde enim positiva dicta est quasi addita naturali legi non ex illa necessario manans. Unde ab aliquibus jus positum vocatur.[2] With former jurists and before the importance of International Law was recognised, Positive Law was held to mean the law enacted by the sovereign government of an independent political society. It must now be taken to include also International Law, so far as the latter is capable of being

[1] Suarez, De Legibus, lib. 1. cap. iii. 9.
[2] De Legibus, lib. 1. cap. ciii. sec. 13.

ascertained and enforced. The element of compulsion to obedience through the public force, distinguishes the Positive Law from all others enumerated by jurists or moralists.

Sir William Blackstone and others have termed this species of law Municipal Law. But the term is inappropriate. Derivatively, the word municipal refers to a corporate town. Blackstone defines Municipal Law—or, as it should be termed, Positive Law—as a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and prohibiting what is wrong.

Now, the error of this definition is, that a law prescribed by the supreme power in a State is still a law, even though it does not correspond with the latter part of this definition, and command what is right and prohibit what is wrong. The essence of a positive law is compulsion by the public authority; and provided the force of a State be employed to compel obedience to any rule of civil conduct, such rule is a law. A bad law is that which imposes an obligation without doing any service. There have been evil laws in all ages, yet they have not the less been laws.

Internal Positive Law is, therefore, a rule of civil conduct prescribed by the supreme power in a State.

It is defined as a rule, in order to distinguish it from any thing in the nature of a sudden command, a request from an inferior, an advice from a friend, or a compact between equals.

It is termed a rule of civil conduct, that it may be distinguished from the rules of moral conduct with which as such the public law does not interfere. The criminal branch of Positive Law does not punish vices, only crimes. The civil branch of Positive Law is concerned with the maintenance and enforcement of private rights, where the violation of them has not affected directly the public security. Individual wickedness is not punished directly by the law except where it interferes with the happiness of others in a manner of which the laws can take cognizance. The prodigal may squander his for-

tune in dissipation: the fool may waste it by reckless mismanagement; the miser may bury it from his friends and the world; but the law is unable to enforce prudence in dealing with one's own, or benevolence towards others. Such things must be left to the progress of knowledge and education. For Justice alone of all the virtues can be enforced by the public authority.

Again, the rule of law is prescribed—that is, promulgated by the official power of the State, and, in the last resort, enforced. Laws, to be obeyed, must be known. Yet ignorance of the law must never be permitted to be urged as an excuse for any accountable citizen. *Ignorantia juris neminem excusat.* It would be absurd to permit any man to profit by his ignorance of the law, so as to place himself in a more advantageous position than another, who did not neglect to make himself acquainted with those rules to which every member of the society ought to conform.

In the Institutes of Justinian the subjects of Law are divided into persons, things, and actions. This arrangement has been followed in modern times, in the code Frederic, the code Napoleon, and by Sir William Blackstone, in his Commentaries upon the Laws of England. It is a most unscientific division, and has checked the progress of the Science of Jurisprudence in Germany, France, and England.

Leibnitz first pointed out that the Roman arrangement confounds fact with law, and assumes as the objects of law persons and things, which are no more the objects of human law, than they are the objects of the greater number of the Arts and Sciences. Such a division is founded, not upon matters of law, or differences in the component parts of law, but upon matters of fact or differences in substances mental and material, tending to indefinite repetitions. The Roman division of things into corporeal and incorporeal, is equally wrong. The term, incorporeal things, was a mere fiction to hide the confusion of ideas. All these incorporeal things are only rights to the services of men.

The compilers of the Roman code set out with a wrong division into two parts which are not exclusive with regard to each other—rights of persons—rights of things. They were led to this division by a species of grammatical symmetry. But there is no correspondence between the two terms except as to form. There is none as to sense. The term, rights of persons, is clear. It means rights conferred by the law on persons, rights which persons may enjoy. But if this explanation be transferred to the term, rights of things, it leads to an absurdity. Things can have no rights belonging to them. The law confers no rights on things. The law does not favour things. Instead of rights of things the expression ought to be rights of persons over things. The change appears slight. But it overthrows the nomenclature—the division of rights, the pretended arrangement of the Roman lawyers adopted by Blackstone, and according to which he has classified the objects of law.

Such have been the views of some most eminent jurists in their department of knowledge. I propose a more convenient division and nomenclature of Jurisprudence and Positive Law. In the present state of the science the following classification of its departments appears correct. Some of the definitions already given are repeated.

Jurisprudence is the Science of Positive Laws, the Art of Legislation, and the Practice of Law.

A Positive Law is a rule of civil conduct prescribed and enforced by a State.

In the Positive Law of every nation there are two elements—the philosophical and the historical. The first element to be acknowledged is the philosophical. The absolute ideas of Justice and Truth constitute its essence. But these ideas assume different forms in different states. Prejudices, manners, and passions, change and deform them. And in Law History becomes associated with Philosophy. From this union the Positive Law of every state arises. And Positive Law becomes an association of universal principles and of national maxims, of rational axioms and of political adages.

The end of Jurisprudence is utility or the happiness of mankind. Nor is this principle peculiar to Jurisprudence. But it has been the professed and real end of all the sciences and arts. The greatest happiness of the greatest number is the true object of Legislation.

All the sciences and arts have for their end and aim utility, civilization, and the happiness of mankind.

Civilization is the highest development of the physical and intellectual faculties of mankind.

Jurisprudence, like every other mental science in the discussion of subjects within the domain of the will, considers not only what the law is, but what it ought to be.

The virtue of justice is the disposition to give every man his right.

Justice alone of all the virtues can be enforced by the public authority.

Legal relations are those which arise from the natural constitution of mankind, and which give individuals a right to the use of force as necessary to society.

The subjects of Jurisprudence are rights and their correlative duties.

Rights are defined by Jurisprudence.

Legal duties are enforced by the Positive Law.

The three natural rights of man are Life, Liberty, and Property.

Rights arise between persons concerning either persons or things.

Actions or forms of legal procedure are the means by which the performance of rights is insured, or their violation redressed.

An action is the legal demand of a Right.

Actions include both a civil action or the legal demand of a right by an individual, in which the end is compensation, and a state prosecution, in which the end is punishment.

If the different rights and duties incident to man in society be analyzed, they naturally divide themselves into four classes:—

Those which arise between individuals in such a

manner that the community is not immediately concerned with them:—

Those which arise between individuals in such a manner that the community is directly concerned, and directly suffers by the violation of the right:—

Those which arise between individuals and their government:—

Those which arise between different states, or the subjects of different states.

Rights and duties arise between individuals in such a manner that the community is not immediately concerned with them. For example, in a civilized country, if a merchant do not deliver corn to a purchaser according to the contract of sale, the violation of the right of property does not immediately cause any injury to the rest of the community.

Rights and duties arise between individuals in such a manner that the community is immediately concerned, and immediately suffers by the infringement. If a burglar break into a house at night, or if a highway robber assault and murder a traveller, independently of the parties immediately wronged, the rest of the community is directly injured. Persons in the neighbourhood of the burglary are put to the expense of protecting their houses by additional safeguards. Perhaps they are obliged to pay additional taxes for police. Terror is diffused. A sense of wrong is therefore sustained by the community, and vents itself in the punishment of the offender with an intensity proportioned to the degree of injury caused by him, and the degree of suffering felt by the people.

Revenge is the origin of punishment. In the early stages of society punishment is severe according to the hatred against the offender, and the indignation which his neighbours feel towards him. The accumulated rage of a community against an individual murderer demands his death. Finally, in the more advanced stage of society, the reformation of the criminal is attempted, and punishment is used only as an example and a means for the prevention of crime, that the punishment may reach

a few, the fear, all;—ut pœna ad paucos, metus ad omnes perveniat.

The branch of Positive Law which gives individuals compensation for a violation of their rights is termed the Civil Law; that branch of Positive Law which punishes offences is termed Criminal Law. If damages completely satisfy the loss, and if the public security is not weakened by the injury, the matter may safely be left to the Civil Law. But whenever the public security is endangered, compensation is insufficient to vindicate Justice, and punishment must be added.

A crime is that violation of a right for which the State provides punishment.

The chief end of the Civil Law is compensation, the chief end of the Criminal Law is punishment; but in many cases both have a concurrent jurisdiction.

In the law of England crimes are divided into three classes—treason, felony, and misdemeanour. The offences against a right designated by the first two classes cannot be the subject of a civil action. Some misdemeanours may come within the province of the Civil Law, and may be redressed by the award of damages against the offender, to be paid to the sufferer.

If we desire to ascertain whether a violation of the natural rights of man—life, liberty, and property—come within the province of the Civil or of the Criminal Law, we have only to ascertain whether such violation concern the individual immediately, and the community remotely, or whether the interest of the community be not thereby directly affected.

Rights and duties arise between individuals and their governments.

The procedure to redress the violation of a right is in all the rude stages of society vague, violent, and uncertain. The savage, who has been wronged, waylays and assassinates the enemy, or else, in the struggle, falls—the victim of superior strength. In time the authority of the law assumes the place of uncertain strife; and the process by which mankind submit their disputes to the

cognizance of legal tribunals is perpetually developed further.

At first only the rights arising between subjects are determined and protected by the law, whilst the Sovereign remains above the law. Under barbaric despotisms the Sovereign acknowledges no legal rule binding upon him in his conduct towards his subjects.

But in time the relations between the government and the people become subjected to certain positive laws. And the body of law determining the relations between individuals and their governments is generally termed Constitutional Law, or Political Law—the latter term is preferable.

The things of the world must be appropriated, whenever that appropriation is necessary for the purpose of rendering them as beneficial and valuable as their nature admits of their being made.

The business of government is to promote the happiness of mankind, by means of rewards and punishments. The rewards, however, in most cases, are given indirectly to the energetic and able men who carry on the business of society.

Government is a necessity. If all men were cultivated, virtuous, and talented, they would discharge towards others all the duties of life better than any government could enforce them. A community of such persons would be a law unto themselves, needing no coercion; and each individual would be urged by the spontaneous impulses of his own nature to do right. Rivers, in the comedy of *False Delicacy*, well says: "Laws were never made for men of honour; they want no law but the rectitude of their own sentiments; and laws are of no use but to bind the villains of society."

However, laws are of use to bind others besides villains; and the object of every good government is, by means of laws, to strive to bring all its subjects up to that standard of duty which the wisest and best of themselves attain.

If this, then, be the necessity for government, we have

to consider what right a government has to coerce and punish its subjects upon occasion.

It is necessary to define the three natural rights of men—Life, Liberty, and Property.

Natural Liberty is the individual's right of not being obliged by any judgment or will with which his own judgment and will do not coincide. But, scientifically defined in Jurisprudence, Liberty is freedom of action, controlled only by laws tending to promote the greatest happiness of the greatest number.

Slavery is obligation of service unlimited in extent or time.

Property is the right of Using.

The right of property is founded upon its subserviency to the subsistence and well-being of mankind. The institution of property is necessary for social order. The exclusive appropriation of things is essential for the full enjoyment of them. The sense of property is bestowed upon mankind for the purpose of rousing them to action. It is the principal foundation of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of Justice.

In the Right of Property, Bentham includes four things:—

1. The right of occupation:—
2. The right of excluding others:—
3. The right of disposition, or the right of transfer to others:—
4. The right of transmission, in virtue of which the integral right is transmitted after the death of the proprietor, without any disposition on his part, to those in whose possession he would desire to place it.

All modern civilized life rests upon the two institutions of Property and Marriage.

The original titles to property are Occupancy and Labour. Finders are keepers by common consent where there has been no previous appropriation. What a man has produced by Labour is his own.

The secondary titles to property are Consent and Inheritance.

Consent includes Gift, Sale, and Exchange.

The right of Inheritance by children of the property of their parents depends on three principles. The children may have contributed by their labour to the formation of the property. Naturally they expect to receive it, and the State's gift to them of the property prevents disappointment. Lastly, by the receipt they are prevented from becoming a burthen to the people. From the inheritance by children to the inheritance by relations the transition was easy and obvious.

Some jurists and publicists have proposed that by law the discretion of the testator should be limited to this, that a certain fixed portion of the property should be distributed amongst the immediate descendants in a ratio suitable to the property and position of the testator. Where persons die without kindred and intestate, the State must succeed to their property. In order to avoid contention an ultimate heir—*ultimus hæres*—must be appointed.

6. The great questions of Political Jurisprudence, the right of government to the use of force, the province of government, its duties as the machine of police and order, and as the guide to progress, demand a more lengthened investigation.

The right of Society to enforce the law by punishment, may be judged from the following considerations:—

When man enters into Society he naturally intrusts the three rights of Life, Liberty, and Property, to the guardianship of his rulers.

As every man in his independent state has by nature the disposal of his property, he can convey the disposal thereof to society as amply and absolutely as he was by separate right entitled thereto.

It is the right, perhaps the duty, of every man to defend his life, liberty, and property. It is his right to kill or bind those who would grievously wrong him.—This right he can convey.

Upon such conveyance it becomes the right and duty of the trustees of the Society to put to death, or imprison,

or inflict any punishment suitable for the prevention of crime upon all who take away, or attempt to take away, the life, liberty, or property of its members.

In the infancy of civilization the private disputes of individuals appear to be decided by arbitrators, chosen and paid by the litigants. Afterwards the State is naturally resorted to as the decider of disputes, because it is the only impartial third party possessing the requisite compulsory force. The whole people, in its collective capacity, is incapable of exercising legal power correctly; for such power ought to be exercised with intelligence and impartiality; and from the tribunal must be excluded the aggressor, the injured party, and their friends. Where the judicial body is very numerous, and where the responsibility is much divided, an honest decision in important cases appears impossible. Historical examples of this are the Athenian Courts in political trials, and the decisions of the English House of Commons as to contested elections when the entire House voted, before the Grenville Act was passed, which referred such matters to a select committee.

The three functions of Government are the Judicial, Legislative, and Executive.

In the infancy of society all political powers are united. They are all held in the hand of the Sovereign, and obey his arbitrary will. But, according to the natural law of the division of labour, a separation of these powers takes place. The Sovereign sinks under the weight of duties which surpass his strength, and which cannot be neglected without exposing himself to complaints, disagreeable even to despotism. To dissipate alarm, and prevent resistance, the protection of a special authority is given to what citizens hold most dear—their property, their personal liberty, their life. The judicial order is founded. By the establishment of tribunals, nations enter into the path of regular institutions.

In point of time the Judicial power is prior to the Legislative, as disputes must have arisen and have been decided before the State thought of enacting a law to re-

gulate future controversy. The duty of Courts of Justice is to apply the Law. But, if the Law be arbitrary, the security which tribunals accomplish is illusory and incomplete. As a consequence of the Judicial establishment Law must be rendered certain. The right of legislation, then, ceases to belong to the Sovereign power, and is transferred to assemblies which represent the nation.

Two powers, the Judicial and the Legislative, are thus detached, and acquire a separate existence. To the Sovereign is reserved only the Executive power.

The Executive power is divided into two branches—the political, that is to say, the direction of the general interests of the nation, and the administrative, which consists in the accomplishment of the public service.

Under constitutional government, political power passes to the legislative assemblies representing the people. The more parliamentary power increases, the more it invades the domain of politics. It conducts the policy of a nation by laws, by financial votes. Arrived at its extreme development, it leaves to the executive power only the accomplishment of that which it has previously determined.

Similarly in the advanced nations the institution of Police takes the power of punishment from the hands of the central government, and, except in the instances of great crimes, confides it to local administration.

Police is a system of precaution for the prevention of crimes and calamities.

It is a step in the progress of society, and in the development of the liberty of the individual, where order is maintained under a system of police, not under soldiers devoted to the central authority and isolated from the citizens.

The private law of a State is divided—as to its sources into common or statute law—as to its subject matter into rights and obligations—and as to the mode of ascertaining and enforcing them into civil and criminal Law. Procedure is the course taken for the execution of the

Laws. It is the means for attaining an end. It is the method of employing the instrument called Law.

The Laws of Procedure are termed adjective, because they assist the enforcing of the substantive laws. The business of a Court of Justice is to examine and ascertain, by legal evidence, the facts; to apply the law to those facts; to pronounce judgment that such is the law, and that certain consequences will follow to individuals, or their property, if the law be not obeyed.

The Political Law of a nation is the whole of the legal relations existing between the governors and the governed. It determines the organization of the legislative, executive, and judicial powers.

Political Jurisprudence embraces a wide range of study —the constitutional history of the Oriental nations—of Greece, of Rome, of the Italian Republics, of France, of England, of the United States, in a word, of all the nations that have developed important political systems. In the progress and development of Society, the most intricate questions arise as to the separation of the judicial, legislative, and executive powers of government, and with respect to taxation and colonization.

In Jurisprudence the term constitution of a State embraces the body of the written and unwritten fundamental laws which regulate the rights and privileges of magistrates and subjects.

Union in Society is the destiny of man. This does not arise from the social compact of which the philosophers of the eighteenth century dreamed; it is progressively worked out by the interior development of the family, and the aggregation of other families. The sense of property is amongst the earliest of our ideas. The child knows he owns his toy as well as the peer knows he owns his land.

Civil government arises from the desire of men to protect their property and combine order and freedom in their intercourse with one another. The interposition of the State is required to redress wrongs, to determine disputes, to enforce obligations. Without government

no property could be secure, no liberty certain, no civilization completely developed. At first, order is the main purpose of government, whilst personal liberty and individual security for property are not so much regarded by those in power. Yet, the despotisms of Asia are preferable to anarchy. Men prove this by living and trading under such systems. In effect, where undeveloped and partially civilized communities exist, absolute monarchy appears to be the natural form of government—as children learn to obey others before they learn to act for themselves.

The tendency of civilization, as developed in the most advanced countries, is to diminish the great power which the Central Government possesses in the early stages of society, whilst in modern times, the entire force of a country can be more directly used for external purposes.

With the progress of knowledge the despotical restraint becomes intolerable; it is no longer necessary, and it disappears. Then the liberty of the individual subject is perfect. The importance of the individual governor ceases. Government becomes the mere machine of police and order. In the more advanced and Republican nations, the individual becomes emancipated from any permanent bond of allegiance. He can transfer his person and property to whatever soil he pleases, secure of equal protection in England or the United States, provided he obey the law. The secret of organized liberty is willing obedience to limited power.

The forms of government differ in various countries, and from causes hitherto by politicians termed accidents. Yet, even politics in time may be reduced into a science; and from Political History may be derived certain general principles which will hold true at all times and under all circumstances.

The different forms of government, the distribution in each state of the power by which the people is governed, the influence of such diversities upon the prosperity of the several nations subject to them,—these are

facts from which must be drawn the principles which constitute the science of Political Jurisprudence.

Two systems of government now contend for superiority in the civilized world. One is the system of Freedom of popular institutions, and of representative government as exemplified in England and the United States of North America. The other is the system of centralized Despotism now existing in Russia, Austria, and France. The principal political disadvantage of Despotism is that it rarely opens a career to the talents of the people. Austria has been a grand despotic state for five hundred years. The suppression of knowledge and the extinction of independence appear the conditions of her existence. Consequently Austria has never produced a single great name in arts or letters—has never produced a great artist, painter, orator, historian, or poet. The main advantage of the system of Freedom is that it opens a career to talents. Nor does it appear now possible to govern enlightened populations by the iron despotic rule of former times. A despotism to be cheerfully obeyed must be that of greatness of intellect and knowledge over ignorance and incapacity. Whenever a great man has been a successful despot, he has succeeded by his power of organizing obedience to himself, and by procuring the talent and energy of his fellows to work in the same direction.

Alexander by his greatness of soul and power of organization swept the soldiers of Greece over the barbaric empires of the day. He was cheerfully obeyed. All the clever men of Greece were proud to be captains under him ; but when he died they aspired to be kings, they quarrelled with one another, and the rule of Greece over Asia ceased. So, Cæsar, Mahomet, Cromwell, Napoleon, were in their spheres organizers of great political revolutions. But in order now to acquire the power of Cæsar, one must of necessity be in intellect and power as far superior to the country gentlemen, lawyers, professors, merchants, editors, artists, tradesmen, and students, that swarm through modern society, and

through clubs, universities, Mechanics' Institutes, reviews, and newspapers develop, criticize, and influence the life in which we live, as these latter are in knowledge, political capacity, power of critical perception, and practical ability, superior to the senators, knights, and plebeians of the last days of Republican Rome.

Napoleon, whilst he held power, in many respects used it well. The public works which his administrative genius constructed ; the code of laws which owes its origin to him ; the destruction of the Feudal abominations effected by him ;—these things show what may be done by a despotism. But the fall even of Napoleon was hastened by men like Lafayette and others who insisted on a share in the public government, and were not content with the Emperor's promotion of solely military talents. Yet men like Cæsar and Napoleon arise but once in a thousand years. So far as we have record there were not five other such in all history. And the rules of politics, law, and government, must be made with a view to the ordinary capacities of mankind, and not with the hope of a perpetual succession of men like Napoleon and Cæsar in every State.

The middle classes never had a career more open to talent than now in England. Competitive examination permits all to enter the great Civil Services. A great political career alone is difficult of attainment for those who are unaided by wealth and aristocracy. In England it is almost impossible for persons not connected with the aristocracy to arrive at the high places in a political career. But many fortunate circumstances have developed English liberty. Many centuries have moulded our political organization. Many races have formed our modern character. The reckless courage and plastic spirit of the Celt, the genius of the Roman for law and government, the working earnestness of the Saxon, the chivalry of the Norman—these things, aided by that zeal for knowledge which consults the wisdom of all languages and ages, aided by those mechanical inventions which circulate the thoughts of the great men of all time through the en-

lightened populations of these realms—all form the constituent elements of the modern civilization of England; and that civilization will never brook a despotism however beneficent, until it verges to its fall.

We live in uncertain times. The populations of Europe demand a career open to talent. And the prizes of revolution, the governments of the realms are perpetually before the ambition of the crowds of youthful, ardent, cultivated minds, produced by modern civilization. If these are not employed by the old governments, they seek to overturn them.

All over Europe the revolt of the over-governed populations in 1848 and 1849 showed that Despotism could be maintained only by cannon at the street corners, and by turning drawing-rooms into barracks for barbarian soldiery. The oppressed populations are for a time again enslaved. Italy under the Romans the mistress of the world, during the middle ages the cradle of public liberty, the seat of commerce, the school of art, writhes in vain under the insolence of foreign armies. But Milan, Venice, and Florence cannot forget their former splendour, when self-governed and free they rose Republics upon the ruins of imperial power or feudal barbarism. They cannot now be drilled into prosperity. Still in vain has despotism with musketry and cannon these two hundred years cut down the ranks of the people; the voids are filled up, new generations grow up full of hope and ardour, remembering the sorrows and the triumphs of their fathers, and the battle re-commences on every side.

7. Security is the principal advantage possessed by modern society beyond every previous stage of man's social existence. Security does not now exist only for privileged races or classes, but, in most civilized countries, is for all. By this protection of the law the public liberty exists; so far as liberty is security against the aggression of the powerful members of society. When we analyze the means by which this modern security is obtained for the populations of civilized countries, we find it is through the

public machinery of justice and police supported by the public Taxation. The desire for property is one of the strongest springs of social advancement. But unless property be protected labour ceases. Unless there be security for industry man will not labour, and Taxation is the price paid for security. Not but that there may exist the heaviest burthens of taxation with at the same time very little security for the tax-payers. The Roman pro-consuls established a system of legalized plunder over the provinces, as the Turkish Pachas now do. And all over the world exist examples of countries once rich and flourishing, reduced, under the heaviest pressure of taxation, by evil laws, above all, by the want of security for industry, to poverty, desolation, and decay. So wherever upon the earth, by law, one man is enabled to reap the fruits of another's labour without compensating the latter, there security does not exist in that degree which legislation should seek to attain. Jure naturæ æquum est neminem alterius detrimento et injuriâ fieri locupletiorem.

The amount of taxation may in two ways be excessive in proportion to the security obtained, either in consequence of the public functionaries who discharge the public duties of Justice and Order being paid at too high a rate, or in consequence of a portion of the inhabitants of the state being excluded from the benefit of the laws. For example, slaves are almost excluded from the benefit of the law; and in most countries tenant cultivators, not being the legal proprietors of the land, are compelled to cultivate at the risk of their improvements being at any time confiscated by the proprietor to his own use. In the representative governments of modern times there is a constant economic tendency at work, desiring to obtain the highest degree of official aptitude at the least expense. So in proportion to the increasing wealth and population of the most advanced countries the public business is conducted at less cost than in former times. And in such countries as England and the United States taxation may be said to be the price of security, since but a very

small portion of their public general taxation is squandered uselessly.

Taxation is one of the subjects which equally are within the limits of Political Economy and Jurisprudence. The study of the political and social sciences is, above all things, most fruitful in beneficial results of a practical nature. It teaches us to employ the experience of one age or nation to direct another and save it expense, inconvenience, and delay; it points out the errors committed in former systems of civil and commercial polity;—it shows how such errors are to be corrected or avoided, and how such systems may be most effectually improved in order to secure the happiness of nations, so far as is permitted to human wisdom.

Few subjects have exercised so great an influence on the destinies of states as the systems of taxations respectively adopted by them. The word taxation is found in all the stirring pages of modern history; and evil systems of taxation have helped most of the revolutions of the world. Who has not heard of the ship-money in England, the tea duties at Boston, the taille and gabelle in France, and the consequences which they aided to produce? It is surprising how few attempts have been made to ascertain the true principles of taxation, and the mode in which different systems have influenced, and do influence the public welfare. The reasons for this are to be found in the military character of the governments of the ancient world; the principles of the feudal system —the incorrect ideas which, down to a late period, prevailed concerning the province of government—the late diffusion of knowledge and education—the late rise into respect and importance of the mercantile and manufacturing classes of the community.

A *tax* is a portion of the property of individuals living in society given by them to their government in exchange for the security which it affords them. *Taxation* is the general levy of particular taxes upon the community: the word is also used to mean that part of the science of Jurisprudence or of Political Economy which treats of the

manner of levying taxes. The word *tax* is probably derived from the same root as the verb to take, and literally means something taken or lifted. In Latin we meet the words *taxare*, *taxatio*—in German, *taeckse*—in French, *taxer*—in Italian, *tassare*. In English the word *task* seems originally to have been synonymous with *tax*. Thus, in the old statute, the *confirmatio chartarum* (25th Edward I.) we meet the expression "aids, tasks, and prises."

Almost all that is now comprehended under the term taxation comes within the definition which I have given above, with the exception of the rates levied for purely local purposes and all rates which are paid for other purposes than those of public security. The taxes in all civilized countries are devoted to almost the same objects. It is necessary to maintain an army and navy to guard our properties and liberties against the ambition of foreign states; part of our taxation is devoted to this purpose. In all civilized societies the proper administration of justice, and the punishment of criminals, is essential to the well-being, indeed to the existence of the community; part of our taxation is devoted to the business of justice and police. In all governments it is necessary to pay the officers at a high rate in order that able men may be obtained to fill such offices; part of our taxation is devoted to the payment of those who carry on the transactions of government. In all countries it is necessary to support in proper affluence and dignity the head of the nation; and every country accordingly pays something to maintain the head of the nation, whether that head be the chief of a barbarous tribe or as in civilized countries called emperor, king, or president. Part of the taxation of all the old countries of the world that maintain their credit, defrays the interest of the national debt contracted in former years, when the taxes raised were not sufficient to meet the expenditure.

It has been made a question with some jurists, although seldom in modern times, whether the support of paupers should be provided for at the public expense. Paupers have no absolute right to support founded on the insti-

tution of society. It cannot be said that those who possess property are, on account of the possession of that property, bound to feed those who do not possess it, and are unable to maintain themselves. The latter are not in a worse condition than they would have been had society and property never existed. But in relation to civil society, the right of paupers to subsistence may be said to be founded on the obedience to the law which society exacts from them. For breaking the law as regards property they would be punished, but not in modern times starved, or otherwise put to death. If one breaking the law should steal a loaf to satisfy his hunger, he would be imprisoned, but during that imprisonment fed. Would it not then be absurd to support the criminal, and allow the pauper who obeyed the law to starve? The support of the poor, once that their right to support, so qualified, is acknowledged, should not be left to voluntary contributions. These are uncertain, according to the fortune and ability of the benevolent. If they be deficient, starvation ensues. If they be superabundant, they offer a reward to laziness. Again, it would be most unjust to leave the support of the poor only to the benevolent, as this would be an exclusive tax upon the best members of society. Besides, under the voluntary system of relief, a just distribution is almost impossible. The most importunate will obtain the greatest quantity of alms; whilst silent poverty will be left unnoticed. And we are to remember that in times of famine the support of the poor by private benevolence would be impossible.[1] The principal reason, therefore, for the support of the poor by a rate is, that it is unsafe for society to leave them without bread. Hunger is a foe to social security. But these juridical reasons for raising a provision to support the poor by compulsory taxes, are quite apart from the charitable duties enjoined by Christianity.

As regards the poor who are too far advanced in life to receive education, no provision should be made for

[1] Bentham's "Civil Code," part i., c. 14.

them beyond the necessaries of life, otherwise the poor's rate becomes a provision and a premium for the idle, and industry is taxed for the support of laziness. But unquestionably the children who are on the rates should be educated and taught some trade, in order that they may in after-life be able to support themselves, and that they may not be a burthen to the community. If all were well educated, and possessed of those prudent, industrious, and virtuous habits which a good education engenders, none would be cast on the rates except the aged and infirm.

It has often excited surprise that, with the advance of nations in the wealth, liberty, and general prosperity which compose our modern civilization, poverty at the same time increases, and able-bodied men are unable to support themselves by their labour. The causes of poverty are to be found in the greater amount of labour required as the society advances in civilization. Labour increases in intensity with the progress of society. The same amount of labour which in an imperfectly organized and thinly inhabited community would be sufficient to maintain a person in tolerable comfort, will, in a more advanced community, scarcely keep him from starvation. This principle has been well exemplified by Mr. Burton, in his "Political and Social Economy." The further that the community has made industrial progress from the original unproductive habits of the savage, the more does it tax the energies of each individual member, and the less will any one who is indolent, or capable only of the lowest species of labour, be able to keep pace with the march of society. A Hindoo must practise more productive industry than a New Hollander—a Chinese than a Hindoo—a Russian than a Chinese;—a merchant in a metropolis must work harder than a merchant in a provincial town, and, generally speaking, the inhabitants of London exercise more skill and untiring industry, and require to exercise more than the inhabitants of any other place upon the earth. It, therefore, is natural and inevitable, that, with the progress of society, a greater

amount of a superior kind of labour is required from us; and, consequently, if unaided, a greater number will continually be left behind in the race of social progress, and will be unable to provide themselves with the necessaries of life. The only means of counteracting this downward tendency is by education, which, to speak economically, enables the poor to employ skilful labour, instead of unskilled. A man able to read and write is, in plain terms, a more valuable member of society than he who is unable to read and write; and unless the poor be well educated, in the progress of civilized nations the numbers thrown on the poor-rates must increase. Juridical science has discovered the true causes of the evil, and points out the remedy—the industrial education of the people. The cheapest and best way for the rich to guard against heavy poor-rates, is to give a good education gratuitously to the children of the poor. Let the best masters and the best systems be provided for them. It is the cheapest policy in the end. Those who otherwise would be paupers and criminals, become useful members of society. How different would the state of Ireland this moment be, if the able-bodied who are in our poorhouses had been well educated and brought up to trades, and were now by industry increasing, instead of, as they are, consuming the national wealth. It follows that the education of the poor, meaning by that term all unable to pay for it, is a proper subject to be provided by the State out of the public general taxes. The economic reason for this is, that if the poor be well educated, the probability of their being unable to support themselves is greatly diminished; and the rates for their support may consequently be expected to be lower. We are also to consider, that where the population is well instructed, and early trained to moral, peaceable, and virtuous habits, less expense is required for the police regulations of society. For almost true it is—

> "Were half the power that fills the world with terror,
> Were half the wealth bestowed on camps and courts,
> Given to redeem the human mind from error,
> There were no need of arsenals and forts."—LONGFELLOW.

And so, the education of the poor may be considered as an auxiliary measure of security.

The duties of Government, in return for which the public taxes are paid, are the defence of the country, the administration of justice, and the preservation of order, all which may be included under the term public protection or security, which latter phrase I shall for the future employ. And a brief mode to express this is to say, taxes are paid in exchange for security. All the taxes paid for the support and maintenance of the executive Government, for the purposes of Justice, Police, the Army and Navy, and the Poor, are all paid in order to obtain security.

Speaking economically there are no other purposes for which taxes ought to be raised, except those connected directly with public security. The education of the poor is directly connected with security—otherwise, they could not obtain education. But it is at least doubtful whether provision should be made from the public taxes for the education of those who are able to pay for it. No person ought to be supported from the public taxes who does not, by his present services, directly contribute to the public security. It should constantly be present to the minds of all statesmen in representative Governments, that taxes are paid in exchange for security, and ought in rare instances to be applied in any other way. This principle appears very obvious, yet it has been much disregarded. It follows, also, from this principle, that all applications of the public money such as loans to capitalists to increase their trade are improper and mischievous. Some States have lent money to agricultural capitalists for the purposes of drainage, and other similar improvements; other States have lent money to manufacturing capitalists for their business. But all the treasure of Government arises only from taxes—taxes levied by constraint upon the community. For a Government to take from one portion of its subjects in order to benefit another, is merely to do a certain evil for an uncertain good. Even if the

taxes were repaid to the State, still the injustice would continue for the time during which they remained unrepaid. But all public loans, grants, and advances, have a natural tendency to be jobbed, misemployed, wasted, and stolen. This is borne out by all history. The capital so lent will always be employed upon branches of industry less productive than those towards which it would have naturally directed itself. The very individuals who borrow the Government money at a low rate of interest, and employ it in drainage or manufactures, would not employ their own capital similarly, or could not borrow money at the ordinary rate for such investments. Why, then, should the Government tax its subjects for these purposes, when individuals consulting their own interests will not meddle with them?[1]

All citizens are interested in having public protection for their private property, therefore all are bound to pay taxes to maintain those persons without whom this public protection would not exist. All are interested in having this public protection in proportion to the value of their property. But in levying taxation, the principle should be kept in view that all departments of the public service which do not come under the head of security, should be made to defray their own expenses. Their accounts should be kept separate, and their cost defrayed, not from the public general taxation, but from the moneys raised in the individual services. For example, the Post Office should defray its own expenses. The rate of postage ought to be lowered, whenever the receipts from that source exceed the expenditure, because a tax upon commercial intercourse is an improper source of revenue. All other expenses which do not come under the head of public security should be defrayed by local rates.

Political science cultivated in free countries, has now demonstrated that all taxation should be for the public good, and is justified by necessity alone; whilst in ori-

[1] Bentham's "Manual of Political Economy," chap. iii. sec. 10.

ental despotisms, like Russia or Turkey, taxation is regarded as an engine to take property from the people for the purpose of enriching the governing classes, and maintaining the standing armies essential to support their supremacy. In England, such opinions have long been exploded. Our armies are no longer as in feudal times the masters, but have become the servants of the State; and taxes are shown by political science to be not the property of governing races, but to be wages paid by the people to certain of their own number in exchange for the public services which are necessary to the existence of public liberty and security.

It is a very common sophism to say we are burdened with taxes; the country groans beneath the weight of taxes. It is quite true that in most of the old countries of the world the rate of taxation is very high. We pay a great sum for justice and police; but then we have justice and police, the security which they afford us—the time which they save us, and it is very probable that production is neither active nor easy amongst people where each takes the law into his own hands.

For example: In some countries the judges are very indifferently paid, and are chosen almost solely from political motives, without regard to their knowledge or ability. The consequence in the first instance is that they take bribes and give their decisions according to the will of the highest bidder. The consequence in the second instance is that the merchants of those countries give no credit, from the great difficulty and uncertainty in recovering their debts. Thus trade and commerce are paralysed. Without credit our modern system of trade could not proceed. The manufacturer gets his bill of exchange discounted by a banker, or some other capitalist, thereby obtaining an advance of money to enable him to pay wages to his labourers who work up the raw material into manufactures. He sells these goods to the wholesale merchant; the latter, however, is unable to pay for them until he has received remittances from the retailers; and the manufacturer, aware

of his solvency, is contented to receive in payment another bill of exchange due at some future period. The merchant hopes by the time the bill will have arrived at maturity to have disposed of the goods to the retailer, to be able to meet the bill, and to have made some profit to support himself in the meantime. Thus, goods pass from hand to hand, and from one country to another. However, only for the system of credit, and the advance of money made by the capitalist in the first instance, to maintain the labourers and others employed in the production of the goods until these were fit to be sold, the probability is, the goods would not be produced. And no man would advance his capital to another, unless there were an easy and secure mode of recovering it by legal process, in case the debtor proved unwilling to pay at the proper time.

Taxation, therefore, is an incident of society. Public order, public liberty, and public justice, are as essential to the complete development of the resources of a country, in the production of wealth, as each of the great agents of production, capital, labour, and the land. No one would till the stubborn earth, or sow it with seed, if he were not certain that the fruit of the harvest would be reaped by himself. The triumphs of mechanical science used as an agent of production in modern times would never have existed if the products had not been secured for the benefit of the producer. The gigantic system of credit now prevalent in commercial countries could not have arisen, if the people had not been willing in the first instance to remunerate and place in an honourable position those members of their own body who discharge the public functions of Justice and Order.

The natural advantages of soil and climate avail very little, unless use be made of them by the energy, honesty, and ability which are required to lay the foundations of civilization. There are countries where the bread-tree grows spontaneous; where fruits and spices hang upon every shrub; where the larger kinds of corn grow with but little labour. Yet, such favoured regions, illumined

by a cloudless sun, with valleys cooled by mountain streams—every field a garden of variegated flowers, coloured with hues unknown to colder climates—are inhabited by listless savages, who sometimes perish from starvation. These magnificent regions are uncultivated and savage, because they never have been inhabited by an energetic and laborious race capable of originating free institutions. Whilst knowledge, capital, and industrious labour, fostered by security, raised Venice and Holland from the seas, and made them both the seats of flourishing communities, powerful in government and war. The barren wolds of Lancashire have been changed into mines of prosperous wealth worth all Golconda, or Peru—to show us that of all the gifts with which the earth has been blessed, and those who inhabit it, the greatest is that prolific mind, that untiring energy with which Providence has endowed man.

In considering the entire question of Taxation, it is most essential to bear in mind the difference between the Western European States of the present day, and the feudal monarchies from which they sprung, and whose forms are still in part retained by them. France, Germany, Spain, and England, during and subsequent to the dismemberment of the Roman empire, were occupied by bands of successful barbarians, who parcelled out the lands of the conquered amongst themselves, and established military aristocracies. The king was their general in war, but had little power in time of peace over his military companions. The word count, which was extensively used over Europe as the name of the feudal chieftains, literally means companion, and is the same with the Latin word *comes*. The mode of taxation in all the countries where the feudal system prevailed was simply this: The descendants of the conquering tribes held their land by military tenure. These military tenants were bound to serve in war at their own expense in their own country, whenever it was necessary to do so, but were originally exempted from all other state burthens. Those who cultivated the land under

them were mere serfs. Trade in those days was contemptible, and traders were plundered openly of their property by the feudal lords. To lend money at interest was almost unlawful for Christians; and the principal part of that business fell into the hands of the Jews, who were persecuted and plundered openly. The taxes, whether levied on the agricultural serfs or on the burghers of the town, were considered to be the property of the governing races, and aided in purchasing the arms and equipping the retainers, by which they maintained their power. Countries ruled under the feudal system by governing races were taxed to the utmost for the benefit of those who governed; and the tax consumers were careless about the cheapest or best mode of collecting taxes, since an extravagant and expensive mode of collection was to them only an increased source of profit and patronage. The lowest class of those subject to the feudal laws suffered more from the individual oppression of the barons than from the taxation imposed by the government. And when we contemplate these feudal oppressions, we are not surprised at Wat Tyler's or Jack Cade's insurrection, or the Jacquerie in France. Even down to the first revolution in France, there existed feudal rights, a number of burthensome privileges, having for their origin not a contract freely entered into, but an usurpation of force over weakness. It was necessary for the feudal tenant to bake his bread at the oven of his landlord; it was necessary for him to grind his corn at his mill, to buy exclusively the goods and merchandise which his feudal lord could sell him. It was compulsory on the feudal tenant to allow his grain to be devoured by his landlord's game. The feudal rights were given up by the French nobility, as it is well known, on the night of the celebrated 4th of August, when the other privileged classes also surrendered their privileges.[1] Fortunately for most civilized countries now, they have not to discuss such sweeping reforms. Most civilized

[1] Thiers' "Droit du Proprietè."

countries now tax themselves; they pay their taxes as wages to the public servants in return for the protection and security afforded by their services; and it is the interest of the people everywhere to have their taxes collected in the cheapest possible manner, and also to have them collected in the proportion most just to every individual in the community.

Adam Smith, in his "Wealth of Nations," has laid down the four following maxims on taxation, and since they were published they have received the concurrence of every sound writer on Jurisprudence.

The subjects of every state ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities—that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation. Every tax, it must be observed, once for all, which falls finally upon one only of the three sorts of revenues—namely, *rent*, *profit*, and *wages*, from one or other of which the private revenue of all individuals must be derived,—is necessarily unequal in so far as it does not affect the other two.

Secondly—The tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to be clear and plain to the contributor, and to every other person. Where it is otherwise, every person subject to the tax is put more or less in the power of the tax-gatherer, who can either aggravate the tax upon any obnoxious contributor, or extort, by the terror of such aggravation, some present or perquisite for himself. The uncertainty of taxation encourages the insolence of tax-gatherers, the corruption of an order of men who are naturally unpopular—even where they are

neither insolent nor corrupt. The certainty of what each individual ought to pay is, in taxation, a matter of so great importance, that a very considerable degree of inequality, it appears from the experience of all nations, is not nearly so great an evil as a very small degree of uncertainty.

Thirdly—Every tax ought to be levied at the time or in the manner in which it is most likely to be convenient for the contributor to pay it.

Fourthly—Every tax ought to be contrived so as both to take out and keep out of the pockets of the people as little as possible over and above what it brings into the public treasury of the State. A tax may either take out or keep out of the pockets of the people a great deal more than it brings into the public treasury in the following way:—1st, the levying of it may require a great number of officers, whose salaries may eat up the greater part of the produce of the tax, and whose perquisites may impose another additional burthen on the people. —2ndly, it may obstruct the industry of the people, and discourage them from applying to certain branches of business which might give maintenance and employment to great multitudes. While it obliges the people to pay, it may thus diminish or destroy some of the funds which might enable them more easily to do so.—3rdly, by the forfeitures and other penalties which those unfortunate individuals incur who attempt unsuccessfully to evade the tax, it may frequently ruin them, and thereby put an end to the benefit which the community might have received from the employment of their capital. An injudicious tax offers a great temptation to smuggling; but the penalties of smuggling must rise in proportion to the temptation. The law, contrary to all the ordinary principles of justice, first creates the temptation, and then punishes those who yield to it; and it commonly enhances the punishment, too, in proportion to the very circumstances which ought certainly to alleviate it—the temptation to commit the crime.—4thly, by subjecting the people to the frequent visits and the odious exami-

nation of the tax-gatherers, it may expose them to much unnecessary trouble, vexation, and oppression; and though vexation is not, strictly speaking, expense, it is certainly equivalent to the expense at which every man would be willing to redeem himself from it.

Thus, the fundamental maxims on the subject of Taxation are—first, that the subjects of a state should pay taxes according to their ability; secondly, that the tax should be certain, not arbitrary; thirdly, levied at a convenient time, and in a convenient manner; fourthly, collected at the cheapest rate.

The statesmen of all civilized countries, in arranging the financial systems of each, and in levying the taxes necessary to carry on the government, all agree that every tax should combine the last three principles—namely, that the tax should be certain, levied at a convenient time and in a convenient manner, and should take and keep out of the pockets of the people as little as possible, or, in other words, be collected at the cheapest possible rate. But the first maxim, namely, that all subjects should pay according to their abilities, is controverted by almost the entire system of taxation all over the world. In fact, most of the taxes levied seem to be based upon exactly the opposite principles. Equality ought to be the rule in matters of taxation, because it ought to be so in all affairs of government. A government ought to give to no one subject more than to another, so it ought to take from no one subject more proportionally than another. As a government ought to make no distinction of persons or classes in the strength of their claims upon it, whatever sacrifices it requires from them should be made to bear as nearly as possible with the same pressure upon all. And thus, least sacrifice is occasioned on the whole. If any one bear less than his fair share of the burthen, some other person must suffer more than his share, and the alleviation to the one is not, other things remaining the same, so great a good to him as the increased pressure upon the other is an evil. Equality of taxation, therefore, as a maxim

of politics, means equality of sacrifice. It means apportioning the contribution of each person towards the expenses of government, so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his.

Such ought to be the rule in matters of taxation. Now, all taxes are either direct or indirect. A direct tax is demanded from the very person who is intended absolutely to pay it. An indirect tax is one which is demanded from one person in the expectation and intention that he should remunerate himself at the expense of another. In practice, direct taxes are generally levied in the first instance upon capital or income. Indirect taxes are levied upon articles of consumption, or paid for permission to enjoy certain privileges. Taxes of this nature were formerly levied upon articles of home produce, when they were exported to foreign countries. But this system has been almost entirely abandoned by every country. A third species of taxation may be said to arise where a portion of the land of a country, or of the rent of the land, is set apart for the payment of a particular class of the public servants. These, however, are never to be considered as proprietors. In the words of Sir James Mackintosh, they are salaried for the performance of certain duties. The mode of this payment is indifferent. It is generally, in rude ages, by land; in cultivated ages, by money; but a territorial pension is no more a property than a pecuniary one. All the taxes in Great Britain and Ireland are indirect, with the exception of the income-tax, and the land-tax in England and Scotland; and throughout the most of Europe the principal taxes are indirect. The principal sources of revenue in the United Kingdom of Great Britain and Ireland are the Customs, Excise, and Stamp Duties—all indirect taxes.

Customs are the duties levied at the frontier upon foreign articles entered for home consumption. One principal objection to taxes of a nature similar to the

custom duties has been, that they have enabled government to interfere with the natural operations of trade, by levying taxes for the purposes of protection or prohibition. It cannot be too often repeated that all taxation should be solely for the purpose of raising a revenue to pay the public servants, that all taxation ought to be solely for the purpose of paying for security. The different countries of the earth, favoured by nature with differences of soil and climate, produce different articles suitable for the taste of man, and we only deprive ourselves of additional sources of enjoyment when, by taxes, we prevent from coming to our own country articles which otherwise would have been consumed by us.

The customs duties have the following economic effects: on the one hand, their large amount is a proof of the extent of trade, and the ease with which a wealthy and powerful people can bear such heavy burdens; on the other they prevent the importation of foreign goods, and the production of home manufactures to the amount of the tax levied.

Excise duties are the taxes levied upon articles of consumption produced within the country. Most of these articles are consumed within the district where they are produced. The price of them to the consumer is raised by the excise duties. The consumption is consequently diminished, and individuals are deprived of that portion of happiness which consisted in the use of these particular articles of enjoyment.

There are other results different from economic results arising from the imposition of excise duties.

A tax on soap is a direct discouragement to cleanliness. Numbers of benevolent gentlemen by means of large subscriptions erect model baths and washing-houses for the poor in several great towns. They would accomplish more of their benevolent purposes if they used their efforts with success for the purpose of removing the tax on cleanliness. It is better to abolish the tax on soap, and educate the people generally,

than to give them special instruction how to wash themselves.

A considerable portion of the public general taxation is raised in many countries by taxes upon the instruments for the communication of knowledge. Thus paper is taxed. The tax on paper is indefensible. It is now admitted by all reasonable men, that the poorer classes of the community ought to be educated. And, accordingly, the education of the people is increasing every day among the nations furthest advanced in civilization —the United States, England, France, Prussia, Belgium. It was once the fashion to discuss whether Education ought to be extended to the People—whether the poor had capacity to be safe elements in institutions.

"Once we thought that education
Was a luxury for the few;
That to give it to the many,
Was to give it scope undue:
That 'twas foolish to imagine
It could be as free as air—
Common as the glorious sunshine
To the child of want and care:
That the poor man, educated,
Quarrelled with his toil anon;
Old opinions, rags and tatters,
Get you gone!—get you gone!"

—MACKAY.

Happily for the progress of mankind, and the peace of the days wherein we live, such sentiments have almost vanished in these countries. The Universities of England and Ireland have been gorgeously endowed, and the middle classes of society principally enjoy their benefits. The magnificent educational charities in England ennoble the country and character of Englishmen. We may reckon these amongst the public endowments for education, although many, if not most of them are of private foundation. They arose from fortunes acquired in trade and bequeathed by private citizens, with that desire to do good, that noble liberality and zeal for knowledge, which form some of the most prominent and best features in the English character. Of late years vast sums are annually voted by the English parliament for the purposes of Na-

tional Education. At the same time the traces of former barbarism in matters of legislation remain. There are still heavy taxes upon the instruments which circulate knowledge amongst the people. How absurd it is that the supreme legislative council of a free and enlightened nation should at the same time vote money for education—and tax paper!

The taxes upon knowledge fall in a very slight degree upon expensive books. They bear with most pressing severity upon newspapers and all cheap publications, inasmuch as these consume comparatively a greater quantity of paper. And nearly two-thirds of the duty on paper used in printing are paid by newspapers and the cheap weekly publications unstamped.

The vast benefits which newspapers enjoying liberty of the press diffuse, cannot be too highly appreciated. The liberty of the press happily exists in these countries. Why do the taxes on knowledge remain? If newspapers did not exist, how ignorant should we not be of the affairs not merely of foreign nations, but of an adjoining county. The mutual ignorance of nations is one of the most prominent causes of national jealousies and wars. The mutual ignorance of local districts fosters paltry local animosities. These evils the newspaper helps to remove. It is now one of the most prominent aids to civilization; the more we cheapen it, the more we aid the advancement of the people. Taxes on the newspaper impede the social progress of the nation, prevent the diffusion of sound political knowledge, and impede peaceful reforms. Nor need there exist any apprehension of the people becoming dangerously devoted to politics if the printing of news be cheapened. With the generality of persons the most important part of the newspaper is the news. The only politics from which any true danger can be apprehended are the politics of ignorance, which lead to misery and beggary, and Jacqueries and Socialism. The politics of knowledge lead to prosperity, and wealth, and peaceful progress. Representatives of very opposite opinions in this country have lately agreed that the study

of the daily events which befall the human race—the forming of the mind upon those questions which affect the destiny of the nation, and the destiny of the world—is a necessary duty for every free citizen; and that to read that page of contemporaneous history, the daily paper, is a worthy avocation for the working man, engaged in business however humble.

"Experience has shown, contrary to the general expectation, that newspapers are one of the best means of directing opinion—of quieting feverish movements—of causing the lies and artificial rumours by which the enemies of the State may attempt to carry on their evil designs, to vanish. In these public papers instruction may descend from the government to the people, or ascend from the people to the government; the greater the freedom allowed, the more correctly may a judgment be formed upon the cause of opinion—with so much the more certainty will it act."[1]

The function of the newspaper is to diffuse a knowledge of cotemporaneous history—to disseminate the ideas of the present time—to translate into popular and easy language the opinions of the scholars of the age—and, by all these, to correct old bigotries and prejudices. Newspapers create and maintain that habit and freedom of public discussion—that interest in public affairs which characterizes free nations; they assist to form and express the public mind. Under despotic governments they are not permitted to exist free from the censorship of the press: for newspapers have essentially a liberal tendency, even though conducted upon principles the most adverse to liberty. Discussion in the long run elicits the truth. Absolutism is only most formidable when it has strength to be silent and not to need defenders. Under despotic governments newspapers do not exist; but free countries adopt the despotic policy, when, by taxes, they obstruct the circulation of newspapers.

And as in the case of the tax on soap, benevolent

[1] Bentham's "Principles of Penal Law," part iii., chap xix.

persons subscribe for wash-houses, without thinking of removing the tax, so in the case of the taxes on knowledge, benevolent persons eloquently commiserate, and liberally assist men of letters in distress, without reflecting that the taxes on knowledge are among the causes of that distress.

Patronage, as a support for literary men, is now at an end. In ancient times men of letters, who enjoyed no private fortunes, looked for their support to patronage alone. Horace and Virgil had Mæcenas and Augustus; and, until the art of printing and the diffusion of knowledge had created a sufficient number of readers to remunerate authors by the sale of their writings, it is evident that thus alone could genius be rewarded. But "those who labour for mankind should be rewarded by mankind—by the many, not by the few." Government may sometimes sparingly exercise a judicious patronage—it may sometimes be a duty to relieve genius in distress—but any regular system of government patronage for literary men is attended with obvious evils. Indeed government patronage and interference appear to be peculiarly inapplicable and injurious in the case of literary men. Authors, above all, should be recompensed solely by the value of their productions, and should not look for reward to the recompense of flattery, or a price for the advocacy of party.

All distress claims sympathy. But there is something peculiarly heart-rending in the poverty of a man of genius. That very same sensibility which had inspired him to eloquence or poetry, serves but to aggravate his calamities in destitution. Numbers of authors must, like the majority of the professional classes and all who labour, be men originally of indifferent circumstances. The chains of wealth fasten men to indolence, and rarely will those bound in their thraldom exert themselves to conquer the difficulties which meet the aspirant to fame at the threshold of every department of professional, literary, and scientific labour. I do not say that in consequence literary men should be supported by taxes

from the rest of the community; but those mechanical agents which circulate thought throughout mankind ought to be exempted from taxation.

If it be desirable to have men of letters in the state, and to endow universities for them, why tax the paper upon which they write, and which printed with their thoughts enlightens the public, and whose sale furnishes their just remuneration? The advancement of Knowledge, the welfare of the People, all Art, Civilization, Happiness, rest most of all upon the strenuous efforts of intellect. All systems of legislation, therefore, which provide for men of letters the full rewards of their genius and labour, in the highest degree contribute to human Progress.

In the course of Time,—that greatest innovator, I trust that a liberal policy will yet abolish the taxes on knowledge. I now resume the general consideration of taxes upon articles of home consumption.

The great objection to the excise duties is their inquisitorial interference with industrious pursuits. The manufacturer, whose productions are subjected to the excise duties, is constantly watched by the officers appointed to gather the taxes; and the necessary interference of the excise-officers during the process of manufacture is even more injurious to the manufacturing interest than the amount of the tax levied. The control of the excise-officers ties the manufacturer to certain rules and processes preventing him from applying the most recent scientific and chemical discoveries, and so retards improvement. And it is certainly a strong objection against these duties, that the security of the revenue is held to be incompatible with the freedom of the manufacturer. Another great objection to the excise duties is the facility which they offer for the commission of frauds against the revenue. In the seventeenth report of the commissioners appointed to inquire into the management and collection of the excise revenue, it was stated, as a striking proof of the extent to which frauds are committed by manufacturers of soap, that "there are in

England fifty that take out licences, for which they pay £4 per annum, each of which makes or rather brings to charge less than one ton of soap per annum, from which it is obvious that as the profits of such a sale would not pay for the licence, the entry is made in order to cover smuggling." These, then, are the principal objections to the excise duties; first, the direct discouragement to home manufactures, by far more than the amount of the tax levied; second, the indirect but far greater discouragement caused by the necessarily vexatious control exercised by the excise officers over the processes of the manufacturer; and thirdly, the temptations to and the facilities for fraud.

Again, keeping in our recollection that the first maxim of taxation is that the subjects of every state ought to contribute to the support of their government as nearly as possible in proportion to their respective abilities, we at once perceive the inequality of the system of taxation upon expenditure. It can never be levied upon individuals in proportion to their incomes. Indirect taxation, in order to be productive, must be levied chiefly or only upon articles of necessity, and these are consumed proportionately in larger quantities by the poor than by the rich. It is useless and almost impossible to tax articles of luxury. The moment a tax is levied upon any article of luxury, ingenuity immediately finds an untaxed substitute, or else the use of the article is dispensed with altogether. Thus, in the celebrated case of hair-powder, Mr. Pitt laid a tax upon it, and the article in a very short time almost ceased to be used. Therefore, the indirect taxes upon articles of consumption must be laid upon articles almost of the first necessity. The poorer a man is the more of his income is laid out upon articles of necessity. One with an income of £150 a-year, consumes the same amount of mere necessaries in the year as a man with £10,000 a-year. It is a mere trifle to the latter, it is some portion of the income of the former. Even assuming persons with large incomes to consume about the same quantity of taxable articles as

persons with small incomes, the latter pay the same amount of taxation as the former, instead of contributing to the support of the Government in proportion to their respective abilities as they ought to do according to the first maxim of Adam Smith.

Another great portion of the public taxation in civilized countries is raised by taxes on contracts. They have been imposed in various forms. One expedient is that of taxing the legal instrument which serves in a court of justice as evidence of a contract, a sale, or a receipt of money, and which, commonly, is the only evidence legally admissible. In these countries, few contracts are binding unless executed on stamped paper, which has paid a tax to Government. Stamps are impressions made upon paper or parchment, by the Government or its officers, for the purposes of revenue. Stamp duties were first levied in Holland. The great contest with Spain had exhausted the resources of the Republic; and a reward was offered to any one who should devise the best new tax. Amongst others, the *vectigal chartæ*, or stamp-duty, was suggested, and introduced in 1624. Stamp duties were first introduced into England by the 5 Wm. and Mary, c. 21 (1694), but for a temporary period. Other statutes have followed, enlarged them, and made them perpetual. Different Acts of Parliament in Great Britain and Ireland make a variety of unstamped instruments invalid; and in order to increase the revenue they multiply the number of stamped instruments necessary to authenticate transactions. Thus the Stamp Acts have given rise to many questions in courts of law, as to the amount of the stamp required for particular instruments—the nature of these stamps, the effect which the insufficiency or erroneous nature of the stamp may produce upon the instrument, and the use which may be made in a court of justice of a paper not stamped, but nevertheless unquestionably recording a particular fact.

Of taxes on contracts, the most important are those on the transfer of property, chiefly on purchases and

sales. Taxes on the purchase and transfer of land are amongst the most objectionable of all taxes. Landed property in old countries is seldom parted with, except from reduced circumstances, or some urgent need. The seller, therefore, must take what he can get, while the buyer, whose object is an investment, makes his calculations on the interest which he can obtain for his money in other ways, and will not give the seller any greater sum, because he is charged with a Government tax on the transaction. The seller, therefore, is the person by whom such taxes, unless under peculiar circumstances, will be borne. The tax accordingly falls upon a man at the period of his distress.

But there is a more important and general reason for condemning such taxes upon sales. Such sales tend to make the property of both seller and buyer more productive. A man sells lands either because he is so reduced in general circumstances that he has no longer the available capital to pay the labour which may render the land productive; or if he be not embarrassed, he hopes with the money obtained by the sale to realize larger profits in some other pursuit than in that of agriculture. The buyer in every case is not ordinarily a poor man, and he wishes to invest his money in land, because he hopes to realize greater profits by so doing. Therefore, all taxes, and all difficulties and expenses annexed to such contracts, are detrimental, especially in the case of land, the source of subsistence, and the original production of all wealth, on the improvement of which, therefore, so much depends.[1]

Similarly all buyers and sellers exchange their property, because they expect the subjects of the respective exchanges will be more valuable to them than the objects which they formerly possessed. If, then, those who wish to sell and those who wish to buy be able forthwith to effect an exchange, the general income will be increased provided they be successful in

[1] Mill's "Principles of Political Economy," vol. ii. p. 410.

their new undertaking, by the respective profits which they will make, in addition to what they realized before.

On the other hand, if the taxes be so exorbitant as to prevent or delay the exchange, they are an obstacle to the increase in the general income. The more facility is given to the exchange of property, the more likely is all property to find its way to the hands of those who will make it most productive.

Amongst others of the objectionable stamp duties in many countries, may be mentioned the taxes on medicine, and the taxes on insurances. By the former, bodily injury may be inflicted upon all unable to afford the payment of the tax; by the latter, provision against accidental calamity is lessened, and the number involved in such calamities is increased.[1]

Taxes on Justice are unjust and indefensible upon the sound principles of juridical science.

The duty of protecting property by means of just laws, promptly, uniformly, and impartially administered, is one of the strongest and most interesting of obligations on the part of government. Mr. Hume looked upon the whole apparatus of government as having ultimately no other object but the distribution of justice. Lord Brougham has graphically expressed the same idea, when he said, that the end of the whole paraphernalia of king, lords, commons, army, and navy, was to place twelve honest men in a jury-box. The passion to acquire property is incessantly busy and active. Every man is striving to better his condition. Constant struggles and jealous collisions take place between men of property and no property—the one to acquire, the other to preserve; and between debtor and creditor, the one to exact, the other to postpone payment.[2] We pay taxes in return for the security afforded by government to our properties and liberties, and it is worse than absurd to discourage by a tax the very

[1] Bentham's "Constitutional Code," b. iii. c. xi.
[2] Kent's "Commentaries," vol. ii. p. 332.

means by which an injured subject seeks redress from the laws of the realm.

It was perhaps natural, in the early stages of society, that the sovereign of a petty state should receive fees from his subjects, upon the arbitration of their private disputes. His revenue derived from his private lands, or from tributary exactions, was not sufficient to pay the expenses of judicature, in addition to the other expenses of government. Even if it were sufficient, the imposition of judicial fees upon suitors was an easy method of raising additional taxes. Thus, the plan of imposing taxes upon suitors who wished the decision of the authorized courts of law upon their private disputes, was originally adopted by every state. The judges even, in every country, were originally paid by fees exclusively; and they accordingly derived an additional source of income from the business in their courts, and were thus interested in the abundance and protraction of litigation. The judges are now paid in most countries by fixed salaries. However, some of the expenses of justice are still defrayed by suitors. This should not continue. Courts of justice should be provided at the general expense of the country in the same way as the army and navy are paid for out of the public general taxation; and suitors ought not to be compelled to undergo any expense, except that which is naturally incurred by providing legal assistance in order to conduct the particular case. In effect, a tax upon the administration of justice is a direct reward offered for injustice. What can be more absurd than that the same legislators should at the same time give rewards for informers, and impose taxes on justice? By giving the bounty they acknowledge that it is right to encourage persons to come forward, and to further the ends of justice; by imposing the tax they throw difficulties in the way of the legal redress for wrongs. It was natural that, in early times, the expenses of justice should be defrayed by suitors. To those rude reasoners it appeared certain that he who obtained a judgment in his favour reaped the principal advantage to be

obtained, and, therefore, that it was but right he should bear the expense incurred. But the parties who are compelled to have recourse to legal process, in order to obtain redress of their wrongs, are precisely those who have obtained least benefit from the general law of the realm. They, at the expense of time, care, and money, have purchased that protection which others enjoy, only paying the ordinary amount of taxation.

Another grievous objection to taxes on law proceedings, is, that they fall upon a man at the period of his distress. At the very moment when something of a man's property is taken from him, and he applies for redress to the public law of the state whereof he is a subject, this is the time chosen to call on him for an additional contribution to the support of the State. To the poor this effects almost a denial of justice. But public justice is a part of the general system of public protection which governments in civilized societies afford in return for the taxes which they receive from the people. By the system of courts of law, that is, the public arbitration of private disputes, and supported in the last resort by the military power, the rights of all are protected. And every contested case which at great cost decides a right, assists in protecting the rights and liberties of all. Therefore, the parties who suffer some injury to their rights ought not to defray the expense of the public justice by which they are redressed. They are the persons least benefited by the law and its administration. As Bentham says, the protection which the law affords them is not complete, since they have been obliged to resort to a court of justice to execute their rights and maintain their rights against infringement, whilst the remainder of the public have enjoyed the immunity from injury conferred by the law and its tribunals, without the inconveniences of an appeal to them. A precisely parallel case is aggression by a foreign state upon part of our community, and a war in consequence for their redress, and to protect them from further molestation. The parties aggrieved are not compelled to

pay the expense of the war. In fact, if it were possible to have private rights settled entirely at the public expense, it would be desirable. But this is impossible; for those whose business it is to manage legal proceedings, could never be expected to have the same zeal in individual cases, if they were paid public officers, and assigned accordingly. The best system of providing for the expense of public justice appears to be, that the public machinery of the law should be paid for entirely out of the public treasury, whilst suitors should be put to no expense, beyond what the advocacy of their individual cases may demand.

The subject of law taxes may be concluded by a quotation from Bentham :—"The statesman who contributes to put justice out of reach—the financier who comes into the house with a law-tax in his hand, is an accessory after the fact to every crime: every villain may hail him brother—every neighbour may boast of him as an accomplice. To apply this to intentions would be calumny and extravagance; but as far as consequences only are concerned, clear of criminal consciousness, it is incontrovertible and naked truth."[1]

I have now pointed out the economic evils arising from the system of indirect taxation. The duties levied upon articles of consumption produced abroad discourage the importation upon such goods, and prevent the production of home manufactures to be sent abroad in exchange. The duties levied upon articles produced at home discourage home manufactures by more than the amount of the tax levied; and by the necessary and vexatious interference of the officers employed to collect the revenue the most injurious effects result upon production. The duties on contracts are most injurious, particularly those on the transfer of land. Where one sells property, it is either because he cannot make an advantageous use of it, or because he hopes to lay out

[1] Bentham's "Rationale of Reward," chap. vi. "Protest against Law Taxes." "Equity Dispatch Court Bill," part 1, sec. ii. "Rationale of Judicial Evidence," Book viii., chap. iii. Book ix., part 2, chap. vii.

more productively the money which he will procure by the sale. When one buys property, it is because he hopes to derive an increase of profit from such investment of his capital. If any taxes or difficulties prevent these parties from seeking this transfer, the country loses the increase of profit which each of them in all probability would have made by the exchange. In addition to these objections to particular taxes belonging to the indirect system, there is the general and insuperable objection to indirect taxation, and that is its inequality. Indirect taxation can never be levied upon individuals in proportion to their means. On the contrary, since, in order to be productive, indirect taxes must be laid upon articles of necessity, which are consumed in as large, if not larger quantities by the poor than by the rich, the poor are taxed at a higher rate in proportion to their income than the rich. A country curate, or schoolmaster, in all probability consumes personally as much tea in the year as a nobleman, yet each pays the same tax; an author writing a single work, consumes as much paper as a nobleman in his lifetime, yet the tax upon a ream of paper is the same for each. We deservedly blame those in France who advocated a progressive Income Tax, increasing in proportion to the amount of the tax, and the consequent ability of the taxed to pay. But under the present system of indirect taxation, the proportionate amount levied in taxation increases with the person's inability to pay. Independent of the amount of taxation, the mode of collecting a tax is of the greatest importance. By adopting a correct mode of taxation, and effecting a saving in the expense of collection, the gross sum levied may be materially diminished. Taxes which in themselves produce but little, may by the manner of collection become the most oppressive. On the other hand, even those taxes which are the principal source of revenue may be collected in a manner so as scarcely to be felt by a wealthy and prosperous community.

The rate of taxation in different countries is now a

matter of the first importance. Since steam navigation has bridged the Atlantic and Southern Oceans, it is easy to remove from the old countries to the new. Heavy taxation drives both capital and labour from the countries where it exists. Poor men go to that country where their labour is of equal or greater value, and where they have less to pay in supporting the machinery of government. Rich men emigrate because in the new countries the rate of profit is higher, their capital is of more value, and because they escape at the same time their former burthens. They thus increase their income in two ways. However, we have to consider that the countries of Europe have not only incurred a vast debt by means of the wars in which they were formerly engaged, but also, that even the reforms proposed in late years require additional and great expenditures of the public moneys. If we require our paupers to be tolerably supported and fairly educated, it requires a considerable sum of our taxation. If we provide national education for our agricultural and manufacturing classes, it demands an increased public outlay. Some able and enlightened reformers require that the resources of our empire abroad should be developed, and the sources of industry at home relieved by an extensive system of emigration and colonization. But if we attempted any thing of the kind, it would necessarily cause a great addition to the public taxation. So, if we seek to provide more efficient and humane treatment for our criminals; if we multiply courts of law for the convenience of parties; if we maintain a good system of police for the protection of property in our cities—all these salutary reforms demand an additional sum of the public money, and entail additional taxation. Hence is the vast importance of the method of taxation, since in all civilized countries the necessity for taxation will increase with the progress of society, and an additional amount of taxes will require to be levied.

The fundamental maxim of taxation is, that the subjects of every state ought to contribute to the support

of the Government as nearly as possible in proportion to their respective abilities. Dovunque vi è societa, vi deve essere un corpo che la governi nell' interno, e che la difenda al di fuori. Questa doppia cura esige delle spese che debbono esser pagate dalla societa che ne profitta.[1]—Wherever there is society there must be a political body to govern it internally and defend it externally.. This double care occasions expense, and it is just that the society which profits by it should pay that expense. This is simply a question of justice, and, as Burke says, "justice is the great standing policy of civil society, and any eminent departure from it under any circumstances, lies under the suspicion of being no policy at all." In considering the general question of taxation, it is of course of the utmost importance to remember this maxim of Adam Smith, and at the same time to remember that taxes are no longer, as in the time of ancient Rome, principally tributes from plundered provinces, or, as in the feudal world, levies upon the poor, but wages paid by the people to the public servants.

Where the pressure of taxation exists upon raw materials, on manufactures, on food, and on the profits of capital, industry is checked—capital and labour are transferred to other countries. It ought to be a general maxim in taxation, that taxes should not be laid in the first instance upon production, but rather upon accumulation. Taxes laid in the first instance upon capital and labour, immediately discourage production ; but taxes laid, for example, upon the existing rent of land, do not discourage industry nor accumulation, if there be security that no further tax will be imposed.

The existing land tax in England is an example of this kind. It is a tax of four shillings in the pound, according to an old valuation. At present it cannot, in most instances, be said to be paid from the income of any person, although undoubtedly it is a deduction from

[1] Filangieri, Scienza della Legislazione, lib. ii. cap. xxvii.

the income which the landlord otherwise would have. When it was first laid on it amounted to a confiscation to the amount of the tax, of the landed property of the existing proprietors. The tenant paid no higher rent in consequence of the tax having been laid on his landlord. It was immaterial to him whether the sum which he paid upon stated gale-days went entirely into his landlord's pocket, or partly into the coffers of the state. So the proprietor, when he sold this property, lost a fifth part of the purchase-money, which he would otherwise have obtained; but the purchaser of the property suffered nothing by the tax. He, when buying, made his calculations accordingly, remembering that he would have to pay this tax, and in consequence offering a less sum; and the tax cannot now be said to be paid by any one. The unredeemed part of it may be treated as a fee-farm rent on the land liable to it. It does not deprive the present landowners of any thing they ever possessed, and they have no right to be exempted from it.[1]

Thus it appears that a fixed tax on rent, in the process of time, would absolutely injure no person; and the rule is similar with regard to a tax on such sources of income as dividends on stocks, and other funds of the same nature. Industry is not injured by such taxes, and the country may go on paying them without the same impediment to her becoming richer and richer which exists where taxes are laid in the first instance upon production. In all new countries, therefore, which have waste lands at their disposal, an advantageous method of taxation is to reserve out of those lands, when disposed of to subjects, a fixed annual rent. The state, of course, cannot compete with private individuals in agricultural or other undertakings, as the management of crown-lands in most countries shows. But the reservation of a fixed portion of the rent of public lands can injure no individual subject.

Again, where production increases, facilitated by new

[1] Brodie's "Taxes on Successions," p. 45.

inventions and discoveries, and relieved from excessive burthens of taxation, accumulation goes rapidly on; and even greater taxes may be laid upon accumulated capital, with scarcely any additional burthen on the people. But where taxes are laid upon production, they directly check it and consequently prevent accumulation. The condition of the artizan, the mechanic, and the agricultural labourer, is of the first importance to modern civilized communities, all whose greatness depends upon their agricultural and manufacturing prosperity. The morals, habits, and education of all labourers are of the dearest interest to every nation, and, to aid their development, the systems of taxation all over the civilized world must be revised, if the word progress for the future is to be synonymous with improvement.

9. Taxes fall either on Capital or Income. It is plain, if the taxes are paid from capital—that is, if they be so excessive that they cannot be defrayed from the income of the country—they will impair the sum which otherwise would be allotted to productive consumption, and to that extent lessen the national resources. If this continue for any time, and be not met by increased productive energy on the part of the people, their wealth will diminish; the fund from which the taxes are to be paid will gradually cease to exist—disasters and ruin will follow. Taxes do not necessarily fall on capital, because they may happen in terms to be imposed on it; nor do taxes necessarily fall on income, because they are laid on income. Suppose a tax of ten per cent. to be laid on income, a man with a present income of £1,000 per annum is required to pay £100. Now this really will be a tax upon his income if, after the tax be imposed, he continues to expend £900; but will be a tax upon his capital if he continues to spend £1,000 per annum.

The capital from which the individual's income is derived may be £10,000; a tax of one per cent. per annum on this would be £100; but, again, if he spends only £900 instead of £1,000 per annum, it is drawn from income only.[1]

[1] Ricardo's "Principles of Political Economy and Taxation," chap. vii.

As most men are possessed of a fair share of prudence with respect to themselves, and a desire to provide for their families, they guard against paying taxes from their capital, and pay them, no matter in what form levied, out of their annual income; that is, the receipts from all sources during the year. Therefore, if we recognise the first maxim of Adam Smith, that subjects should pay according to their ability, we see that the justest mode in which to make them do so is, to raise the annual sum required for the public expenses by an annual tax on income. Taxes, whether direct or indirect, are ultimately paid from income, and, upon the first principles of justice, they should be levied upon that income according to its amount. In the present system of taxation in Europe no reform upon so large a scale is possible to be accomplished. Laws can only be effective when they suit the general expectation, the temper, wishes, and education of the people; and the people in most countries require a much superior juridical education before they can perceive the cheapness and justice of an income-tax. Large bodies move slowly, and existing interests and liabilities must be regarded. For these reasons it would not now be possible to introduce a direct tax upon income in exchange for the present system of indirect taxation.

Besides, it is always expedient to keep in view, that it is easy and unobjectionable to raise as large a revenue as conveniently may be from those classes of luxuries which have most connexion with vanity, and least with positive enjoyment—such as the most costly varieties of all kinds of personal equipment and amusement. It is also easy and unobjectionable to raise a considerable sum by taxes upon stimulants, such as spirituous liquors and tobacco, provided the tax be not so large as to encourage smuggling. These stimulants are scarcely required as necessaries by any. And the fiscal is crowned with a moral use when such taxes diminish the consumption of an article like ardent spirits, the excessive drinking of which is pregnant with future misery. Wherever smuggling prevails a useful hint is given to the financier that the

tax is too high; and once a heavy system of taxation causes smuggling, and the government tries to prevent it by forcible means, there is hardly any limit to the evil; for the collection of the taxes requires an immense number of officers, comptrollers, overseers, and soldiers. The public freedom even of honest individuals, is laid under restraint, and a great part of the revenue is exhausted by the expense of collection.

The reasons which I have given above merely show that the most equitable system of taxation is a direct tax upon income; and it therefore might at once be substituted for the taxes on knowledge, the taxes on justice, and other taxes, when they shall be removed in the progress of civilization.

The great objection to an income-tax has been the supposed difficulty of ascertaining the incomes of individuals who would be inclined to evade it. Incomes arising from the rent of land and houses, mortgages, funded property, may generally be known with almost mathematical accuracy. The persons, therefore, to whom an objection of this class could possibly apply, are professional men, merchants, manufacturers, and traders. As to these it is perfectly plain that with the progress of society the false returns would be comparatively few. Honesty is the best policy, and not only the best, but the most successful. All, with scarcely an exception, who have succeeded in life, in trading or professional pursuits, have succeeded by the strictest adherence to truth, and their honesty would not desert them in the payment of their taxes. With the general progress of enlightenment, the reluctance to pay taxes will gradually diminish, provided the tax-payers through their representatives possess an efficient and direct control over the public expenditure. In countries where a representative government does not exist, the greatest reluctance to pay taxes is shown, because there the people have no control over the expenditure of the taxes which they pay.

The next great objection to the income-tax is, that it

is inquisitorial in ascertaining the exact amount of a man's income. The amount of annual income derived from realized property is generally as well known to a man's neighbours as to himself. The landlord, the tenant, and the mortgagee, all know what they pay and receive; and if any one wish to conceal the amount of his income, it is generally in order that he may live beyond it for some time, and in the end defraud his creditors. An income-tax is certainly not nearly so inquisitorial in its nature as the Excise; the officers of which branch of the public service keep a continual watch over the manufacturer, and know almost every thing concerning his trade, the manner in which he conducts it, his receipts, profits, and expenditure. Persons, besides, who carry on trade, not in a hazardous and too speculative a manner, but prudently, do not dread an exposure of the state of their affairs; and I am certain that publicity in all cases would be beneficial to the public, and would only injure a few fraudulent individuals, who by concealment are enabled to carry on their projects somewhat longer, terminating in consequences finally more injurious to themselves and all connected with them. Private convenience must yield to public good. It is essential to all great questions of finance to ascertain exactly what is the taxable income of the community, and what, in cases of national emergency, they could afford to pay. One of the greatest of the social evils of modern life is the custom of attempting to maintain the appearance before the world of a larger income than is really possessed; and it would be better for those who yield to this weakness, if the extent of their means were publicly known, and the temptation removed of expending more than they can afford—stinting real wants to make a false show externally.

Another objection is, that the tax-payers would be unwilling to pay directly so much money as is required in old countries to carry on the expenses of the Government—although paying indirectly at present they have but little objection. This is an objection which will disappear before the progress of education.

But even the reluctance to pay directly appears to me one of the arguments in favour of the income-tax. The public would see with their eyes open the sums which they pay in taxation, and would insist on a proper application of the public moneys. As a means of decreasing the difficulty, the income-tax might be collected in small sums—for example, once a month.

There is another objection urged, which is, however, of small weight—that such a tax has a tendency to diminish the fund which otherwise would be used in employing labour. There is no doubt but that there is such a tendency. However, it only shares this evil in common with all other taxes, and as it is cheaper in the collection, and does not raise the prices of the articles of consumption, it is less open to that charge than any other species of tax.

It must be apparent that the same amount would be collected at a cheaper rate through means of an income-tax than through the customs and excise. There would not be required the same numerous staff of officials watching the different manufactures, nor the police force, the preventive service, the coast-guards, and all the expensive machinery required to prevent smuggling by the laws which hold up a premium for it.

It remains to be considered with respect to an income-tax, whether it should be levied in the same proportion upon all incomes, or whether incomes derived from realized property and permanent sources should be taxed at a higher rate than incomes derived from precarious property—such as the wages of mental or bodily labour, and the profits of trade. It is also to be considered whether small incomes ought to be taxed at the same rate as large incomes. On these two questions various statesmen and economists have at different times proposed various plans. They are of the utmost importance to consider, as the gravest objections to the income-tax arise from the doubts concerning them.

I shall first consider whether large and small incomes ought to be taxed at the same rate. And it is

necessary to remember that at present, under the indirect system of taxation upon necessaries wherever it prevails, persons with moderate incomes are taxed at a higher rate than persons with large incomes, because the former consume as much or more of taxable articles than the latter. In taxation, equality of sacrifice is, if possible, the first thing to be attained. Is this, then, accomplished by making each contribute in proportion to his pecuniary means? It is plain that a tax of £10 taken from a person who has only £100, is a greater burthen than £100 taken from a person who has £1,000. It deprives the former, perhaps, of some of the necessaries, the latter of only a few of the luxuries of life. Therefore, the French school of economists have sometimes advocated "l'impot progressif," that is, a graduated income tax, in which the percentage rises with the amount of the income. This appears to me to be erroneous in principle, as it is a sort of penalty upon wealth, and a direct check upon accumulation. The plan originally suggested by Bentham, and adopted by Mill, appears to be the best—namely, to leave untaxed a certain minimum of income—say £50 per annum—sufficient to provide the necessaries of life for a family. Or if it be considered expedient that all enjoying the protection of the law should pay a small sum by way of contribution towards its expense, let there be a small capitation tax, or a tax per head upon all whose incomes are under £50 per annum; and let incomes exceeding this amount be taxed, not upon the gross amount, but upon the net excess above £50. For example, an income of £60 should be taxed only as a net income of £10.

But the more important question is, whether the profits of trade, salaries, annuities, and the gains of professions, may not justly be taxed at a lower rate than the incomes derived from realized property. Remembering that persons should pay for public protection according to their ability—that is, according to their property,—it would appear at once that those who de-

rive their incomes from uncertain or temporary sources should not pay so much, or at the same rate, as those who derive their incomes from permanent sources. This question has been argued with great ability, and has been made the principal objection to the income-tax in Great Britain and Ireland. But I will illustrate the position by an example. Compare the case of one deriving his income from an annuity of £400 which will perish with him, and one possessing an estate of £400 per annum, the landlord is more interested than the annuitant in the protection afforded by the law, and should pay more; he is better able to pay, and should consequently pay more. Such is the argument advanced.

Again, compare the condition of a professional or mercantile man beginning the world with the condition of a landed proprietor enjoying the same income. In the present day there are many such men, of education and talent, who have to surrender most physical comforts, strain every nerve, and often sacrifice health itself to eke out a scanty income as the stepping-stone to ultimate advancement. In such a case a tax falls upon a man's energies and abilities, which, of all other things, ought to be fostered and protected by the law. Precarious health, daily exertion, the studies of night, ought not to be taxed at the same rate as realized property. This argument, however, is equally strong both against the present system of indirect taxation on expenditure, and an income-tax which would tax at the same rate all incomes, in the usual sense of the term. Nay, the argument is much stronger against the present system of indirect taxation upon expenditure; because, now, the smaller the income which is spent upon taxed articles the heavier in proportion is the tax. And it is very strange that although some eloquently commiserate a professional or mercantile man paying an income tax at the same rate as a landed proprietor, and ingeniously use this as an argument against the income-tax, they do not reflect that, under the present system, all noblemen, landed proprietors, mercantile and professional men,

mechanics and farmers, are taxed at the same rate for every shilling spent on taxable articles ; and according as the income is less, the rate of the tax proportionably is greater. However, in effect, an even tax on income, as the word is generally understood, might, in certain cases, be more unjust than the present indirect system of taxation. For although a person with a precarious income, under the indirect system, pays as much in taxation as one with a permanent income, still that portion of his income which he saves almost altogether escapes taxation.

The problem to be solved is, how to have these various species of incomes taxed equably—namely, the rent of land, the profits of capital in trade, annuities purchased by the parties enjoying them or by others for them, salaries in situations which may not be permanent, salaries in situations which end only with life as in the case of beneficed clergymen and fellows of colleges, and lastly, that class of income which may be termed the gains of professions, the wages of intellectual or bodily labour, paid by those who reap its benefits, and lasting only so long as its recipients are able to serve their fellow men.

Moved by the considerations which I have mentioned above, some have proposed to tax realized property at a different rate from wages, profits, or annuities. The value of landed property averages about thirty years' purchase, in old countries and in prosperous times, whereas the income derived from wages or from the gains of a profession, can never be rated at a higher value than fifteen years' purchase. Again, the profits of trade may be considered as half derived from personal exertion, and half from capital sunk in realized property. It is generally understood that the rate of profit obtained on capital employed in trade, including the wages of superintendence, is double the rate of interest on money lent in the same country. Therefore, if a scheme should be adopted of taxing different species of incomes at different rates, the incomes derived from wages or professional

gains, should be taxed at half the rate of the incomes derived from realized property; and one-half of the profits of trade should be taxed at the rate assigned to real property, and the other half according to the rate at which wages and the gains of professions are taxed.

Different other schemes have been proposed in different countries. For example, in the free city of Frankfort the following portions of income are entirely excluded from the taxation :—first, that part of the yearly income which has been employed in the extension and improvement of trade—secondly, that part which, owing to existing taxes, is a charge upon trade, for example, licenses for innkeepers.

But the strictly scientific scheme of taxation is to tax all incomes at the same rate. Where men enjoy a certain amount of income for a certain time under the protection of the law and the government, they should pay for the support of that system of public protection equally in proportion to the amount of their incomes. All should pay to the government at the same rate for the security which enables them to enjoy a unit of income during a unit of time. Such is the scientific principle. But, then, what is income? It appears to me that the difficulties into which economists and statesmen have fallen on this subject, aided by that large class of worthy citizens who are always anxious to shift the burthen from their own shoulders to those of others, have arisen from their not considering what income is. Now, income is, literally, all that comes in to a man in the year—all that he receives as gain during the year over and above his property at the commencement of the year. Therefore, the income-tax should be paid upon all the property which one receives as gain during the year. And this at once solves the difficulty about apportioning the rates of taxation to different incomes; for, if one received property by gift, inheritance, or any other means, say to the amount of £20,000, he should pay the income-tax for £20,000 for that year. It is self-evident that this solves the suggested difficulty as to the inequality of taxation

upon incomes of the same amount arising from sources essentially different in their nature. The capital, on coming into the hands of a new proprietor, without purchase, is taxed as income for that year. The income from it is taxed every year it lasts.

I include under the income tax the tax on successions, which, in itself, is one of the least objectionable methods of taxation. Mr. Brodie has summed up its advantages. A person, on coming into possession of his property, pays a portion at once more willingly than if he were to be harassed by the periodical visits of the tax-gatherer. Such a tax is levied at the precise time when the owner acquires his fortune, or an increase of it.

It is probable that the laws of inheritance will for some time occupy the attention of jurists and economists. We are evidently on the eve of regulations concerning them, which will have the most serious effect upon the economic conditions of society. Mr. Mill considers that freedom of bequest should be the general rule, but limited by two things; first, that if there are descendants, who, being unable to provide for themselves, would become burthensome to the state, the equivalent of whatever the state would accord to them should be reserved from the property for their benefit; and secondly, that no one should be permitted to acquire by inheritance more than a moderate independence. In case of intestacy, the whole property ought to escheat to the state, which should be bound to make a just and reasonable provision for descendants—that is, such a provision as the parent or ancestor ought to have made.[1] It may, in future times, be considered whether any except descendants, or the nearest relatives in the ascending line, should be permitted by the State to acquire property by succession. It may also be considered whether persons have a right to leave their descendants unprovided for, and whether all descendants should not receive a certain share of the ancestor's estate. Lord Alvanley, when

1 Mill's "Principles of Political Economy," b. iv., c. ix.

Master of the Rolls, said, in Rawlins *v.* Goldfrap,[1] "If the father had thought fit, he might, I am afraid, by the law of this country, leave his children upon the parish. I am surprised that should be the law of any country; but I am afraid it is the law of this; and I have taken occasion before to say so. Not even the parish, in such a case, can come against the executor." But questions such as these are far in advance of the present state of legal or economic education.

In conclusion, one general argument may be noticed in favour of direct as contra-distinguished from indirect taxation. A direct income or property tax reaches absentees. I have never agreed with those political economists who contend that absenteeism is no evil to a country. It is true, the worst results of absenteeism are seen only in the remote agricultural districts, where no middle class exists. In rich and flourishing cities, if some of the principal proprietors be absent, they are scarcely missed—there are others to discharge the various important duties without them. But in districts where there are only two classes—a poor dependent peasantry and some few great proprietors—the absence of the latter, and the bad administration of the powers which belong to a landlord, cause incalculable injury.

An absentee is one who derives his income from one country and resides in another; but the term is generally applied to landlords only as the most numerous class of absentees. They are the most numerous class of absentees, because from the peculiar powers which the law gives them over those who rent their land, such as the power of distress, it is easier for them to absent themselves from the personal superintendence of their property than it is for any other class of capitalists: if a merchant were an absentee from his office, he would soon be a bankrupt. And the best way to provide against absenteeism is, to leave the landlord only the same powers to recover his rent which other creditors have

[1] Rawlins *v.* Goldfrap, 5 Ves. jun. 444.

to recover their debts—to remove all the legal restrictions which tie up land from being used and enjoyed to the fullest extent, either by the legal proprietors or the tenant cultivators—to make land a marketable commodity, and teach men to regard the possession of large landed estates, not as a source of paramount influence, but as a mercantile speculation.

Absenteeism has the following injurious effects upon the production and accumulation of wealth in a country.

Accumulation, or the increase of wealth in a country, can only ensue from profits and from savings. All persons who supply the demands of others obtain a profit by the transaction; at least, the obtaining of a profit is the object with which a demand is supplied, and the actual obtaining of a profit is the object without which a demand cannot be supplied. It is in one sense immaterial whether the absentee spends his income productively or not. But no income, whether received in money or in kind, can be spent without indirectly causing profitable production, for every person who supplies the wants of the spender of the income receives a portion of the spender's money, part of which portion is the profit of the supplier. If the income derived from England be spent in France and Belgium, persons in France or in Belgium derive a profit from supplying the absentee, and this profit enables them to accumulate. This profit also is something taken from the profits of those who would otherwise supply the demand of the consumer in England. If all the rich persons who now live in London and require commodious houses, servants, furniture, clothes, fruits, vegetables, and soforth, were to settle at Brussels, the houses which are now built in London for their residences, or for those of the shopkeepers who supply them with luxuries, and the grounds which are employed as gardens round the metropolis, would not exist. All the shopkeepers who supply the persons in London with luxuries would cease to make so great a profit, and would follow the wealthy classes, by whose

expenditure they had existed, if distance, language, and other difficulties did not prevent them. Hence there would be no longer occasion to supply those who minister to the wants of the wealthy classes with the corn and meat raised in the country, and the production of England would be diminished. Such are the injurious effects of absenteeism upon the production of wealth.[1] I do not now treat of it otherwise. At the same time I do not propose that any tax should be laid upon absentees, for the purpose of compelling them to reside upon the spot whence they drew their income. Such a principle is adopted by Russian policy; but the only effect it could have, if enforced, would be to diminish the value of certain remote districts. Absentees, besides, are sufficiently punished by the necessary deterioration which ensues when agricultural property is not under the eye of the owner. However, absentees ought to pay an income-tax for the following strictly juridical reasons. As I have before stated, taxes are paid by the subjects of a Government, as wages to the public servants, for the protection afforded by their services to their properties and liberties, and taxes should be paid in proportion to the individual's ability. One who derives an income from a country should, wherever he resides, contribute a just proportion to the taxation which pays for the public protection and security, without which his income could not be collected. At present, one who derives an income from England or Ireland, and resides in France, has his property still protected for him; but, except under the income-tax, he escapes the taxation, which he should have paid had he resided at home. This is manifestly unjust. It would be considered monstrous if one deriving a large income from a country, and resident in it, were exempt from its taxation. Is it not more unjust that one being out of the country, and not benefiting it by his expenditure, should not contribute to its public burthens? At present, under the indirect

[1] Bohn's "Standard Library Cyclopædia." Title, "Absentee."

system of taxation, an absentee enriches a foreign country by his expenditure, while he wholly escapes the taxation of his own; but if a direct system of taxation were substituted for the present system, by remaining abroad the absentee would be at least under a double set of taxes; and in any event it is just that a person deriving an income from a country should pay proportionately for the protection by which he is enabled to enjoy it.

10. I cannot conclude the subject of government without discussing the important and debated questions which relate to the encouragement of Art, Science, and Education, by endowments from the public moneys. The primary object of government is security; but the question arises—is it advisable for a powerful and wealthy community to make public provision for other purposes? In Great Britain and Ireland, there is less spent by government upon Education, Literature, Art, and Science, than in any other great community.

I have already discussed the question as to the education of the poor by the State. It is a measure of security; and for the poor education should be gratuitous. Nay, places of public amusement, museums, parks, and picture-galleries, open to the public—even these may be considered as auxiliary measures of security, inasmuch as they refine the public taste, create more wide and generous judgments, unfold more ennobling pleasures. The craving for excitement and recreation is natural to us. The wearied and depressed spirits of those who live the crowded life of laborious cities, must in some way be refreshed. When daily labour is performed, when the claims of social duty are fulfilled, moderate and timely amusement claims its place as a want inherent in our nature. The rich have a thousand ways of gratifying this natural desire for excitement and relaxation. In England and Ireland the poor have almost but one—intoxication by the drinking of ardent spirits. It is right to strive to rescue the poor from this dominion of the grovelling and the vile—to give them some idea of the grand achievements of antiquity—the magnificent

efforts of the human race—the beauty of Nature and Art. But institutions such as I have alluded to can be supported on a large scale only by public taxation.

To make, also, the education of the people with certainty a measure of security, they ought to be instructed in the principles of law and political science. Under the title of law, the children of the people should be instructed as to the criminality and penal nature of the most prominent offences. It has been remarked that crimes against the person occur more frequently in some districts than others. This is to be attributed not merely to a degree of greater barbarity, but also to a greater ignorance of the law. The danger now to be apprehended from the Socialist sects through Europe, arises from the prevalent ignorance of history, of the true nature of man, and of correct political principles.[1]

But the question arises, should colleges and universities be provided out of the public general taxation to educate those of the middle and upper classes, who may be able to avail themselves of them. Adam Smith entertained a very strong opinion upon the subject. He considered such endowments most injurious to the cause of science and education.[2] He considered that if a man's emoluments be precisely the same, whether he does or does not perform some very laborious duty, it is his interest either to neglect it altogether or perform it in a careless and slovenly manner; and that were there no public institutions for education, no system nor science could be taught for which there was not some demand. A private teacher could never find his account in teaching either an exploded and antiquated system of a science acknowledged to be useful, or a science universally believed to be a mere useless and pedantic heap of sophistry and nonsense. Such systems, such sciences can subsist nowhere but in these incorporated societies for education, whose prosperity and revenue are, in a

[1] Willm's "Education of the People," c. v., s. 14.

[2] Smith's "Wealth of Nations," Book V., chapter i., part ii., M'Culloch's edition, p. 341.

great measure, independent of their reputation, and altogether independent of their industry.[1]

Such have been the views of this first of economists upon this important subject. I have given his words: they are worthy of the gravest consideration. These are among the most serious dangers against which universities have to guard. Adam Smith argues not merely that it is wrong to tax one part of the community for the sake of endeavouring to give a higher class of knowledge to the other, but that these endowments are positively injurious to science and education. Can this be true? Does independent wealth destroy the desire for knowledge and the zeal to communicate it to others? And is that poverty which we have learned to mourn as the wretched companion of laborious genius, absolutely then the condition by which that genius is forced to labour? In most numerous instances in England, Ireland, and Scotland, it certainly has happened that apparently the most triumphant success in a college career has been the ruin of the fortunate individual, in every point of view except his material comfort. High and varied talent and strenuous industry have often found in these old universities a sudden grave by obtaining a comfortable and idle competency!

And yet few things are greater than a well-conducted National University, wherever it is to be found, or such, at least, as one might be made. A National University —at the same time flinging open its gates to all— embracing amongst its professors the matured intellect of the nation—affording the soundest instruction in the varied branches of that social education becoming the gentleman—and employing that special discipline necessary for individual professions—cultivating Art—elucidating Antiquity—instructing the youth of a nation in the practice of its laws—and with funds for the assistance of penniless young men to educate themselves for the professions of their choice—this is one of the noblest

[1]Smith's "Wealth of Nations," Book V., chapter i. part ii., M'Culloch's Edition, p. 350.

institutions of Civilization; and wherever it may exist, exercises the most important and beneficial influence.

Can it be said to be injurious for the nation to continue the primary instruction given to the poor up to the highest order—to rescue from the drudgery of manual labour the intellects which occasionally appear amongst that peasantry which has produced such men as Arkwright and Robert Burns? A distinguished publicist understands national education thus:—One grand system of public instruction, given and regulated by the State, commencing from the village school, and proceeding step by step to the College—higher still to the Institute—to the University,—the gates of science opened wide to all the talents,—no parish without a school, no town without a college, no city without a faculty,—one great net-work of intellectual studia, lycea, gymnasia, colleges, chairs, libraries, mingling the radiance of their knowledge over the surface of the country—everywhere arousing capacities and animating vocations;—in a word, the ladder of human knowledge, held firmly by the hand of the State, placed in darkness the most obscure, and ending in the light—the heart of the people put in communication with its brain.—Such a system may yet exist. But the question of taxing the community for the education of certain of the middle and upper classes of society is different.

A University has two functions—one to be a centre for educated intellectual men, to pursue together the investigations of science—the other as a place for superior education, whether general or professional. The success which has attended the old Universities of Europe has arisen principally from their discharging the first function. A college has no magical power to make scholars. The education given by endowed teachers, wholly independent of their pupils, never has been, and never can be, so successful as where a teacher is paid directly for the work which he does. That the portion of collegiate endowments applied for this first purpose has been well-spent money, the names of Sir William Blackstone,

Adam Smith, Judge Story, Chancellor Kent, Guizot, Niebuhr, and Savigny prove—all lecturers in colleges, and who, by their genius and research, have advanced to the highest degree of excellence the subjects which they taught. Therefore, taxation for the first purpose is right, as a homage to Science and Art; and in order to provide their votaries with the means, untrammelled by worldly care, to follow their favourite pursuits. But taxation of the entire community for the education of some of the upper and middle classes through means of Universities, cannot be justified with certainty. Still, incidental to the first function of a University is a certain proportion of education. Unquestionably in most branches of science teaching improves the teacher. And to this amount at least, education ought to be cultivated in Universities. At the same time, it ought to be paid for by those who receive it.

The entire question is one of the greatest difficulty, and not to be settled until a very distant period. In the meantime, vast endowments at present exist for the purpose of giving superior education. And it is our duty to render them as available as possible to satisfy the wants of the age, and to aid the progress of society.

The sanitary arrangements of the public are evidently proper subjects to be under the public control, and to be provided at the public expense. If each person were left alone and undirected to make such arrangements as he pleased for the cleansing of his house, the cities of Europe would soon be like Cairo and Smyrna, reeking with filth, and periodically decimated by the plague. The public cleansing and draining of cities may be considered as a measure of security. If through a reckless disregard of the poor, the legislators of society permit owners of land to let to the poor unwholesome dwellings, undrained, unventilated—if they neglect to provide for the cleansing of the ways before their houses—neglect to supply them with water—tax their soap—leave them to wallow in filth, which their daily labour leaves no time to remove—the laws of disease punish the wealthy

for that neglect; and Death generated in those unwholesome dwellings marches with an equal step to the palaces of the rich. Hence, even leaving benevolence and charity aside, it is incumbent on those who have property to consult for these things, and to raise money for these purposes by public taxation.

The great cities of the modern world, in wealth so far superior to the congregations of human beings who dwelt in the cities of the ancient world, are, in respect to sewerage and the supply of water, in many instances inferior. This blot upon our modern civilization it should be the aim of the public men of all civilized countries to remove. One duty is on us all, to lavish our social energies upon the destruction of misery. No more effectual means can be found than to bring the light of day, the air of heaven, and the water of the streams to those noisome alleys where the poor rot in filth uncared for and unknown.

Some departments of the public service are supplied with funds out of the public general taxation, some by local rates. Whatever directly concerns the public security at large should be provided for out of the public general taxes; whatever institution or department only benefits the district where it is placed should be supported by local rates. Thus, the departments of the executive government, justice, the army and navy, should be supported out of the general taxes. But it is only just by local rates to provide for the police of cities, and the expense of making and repairing roads.

The principle has been adopted under the poor-laws in the United Kingdom of giving the power of taxation and general control in the first instance to local bodies, subject to a central board which provides for the legal discharge of the duties with respect to the relief of the poor, revises the general management of the local guardians, and receives the reports of inspectors appointed by the government unconnected with the local boards. It appears to me an admirable precedent for the management of all departments requiring local taxation; it is

a direct precedent for the manner in which sanitary affairs should be conducted. Sanitary guardians might be appointed in a manner similar to the poor law guardians, with power of taxation for sanitary purposes. And their proceedings might be subject to the authority and approval of a central board, constituted like the poor-law commissioners, and like them receiving reports from its own inspectors.

For purposes of the education of the poor also, powers might be given to local boards to raise taxes, subject to the approval of the government, or of a commission appointed by government. In matters of education the control of a central authority is most essential. The same powers ought to be given to local bodies for the purpose of building museums, picture galleries, and libraries—all of course public. Every institution in the country to which the public taxation has ever contributed, or does contribute, ought to be open to the public. All these local rates, in the same manner as the public general taxation, should be raised by a direct tax upon income. All who live in the district are as much interested as the owners of real property, in the security obtained by the legal provision for the poor. And the same principle applies to the other subjects which I have stated as proper for local taxation.

Plenary powers of taxation for local purposes ought to be conferred on boards elected by the ratepayers at large, and to which all ratepayers ought to be eligible. No taxation is paid so cheerfully by the people as that which they see directly expended amongst themselves. The power of managing such public matters also cultivates a municipal spirit and a capacity for public affairs, founds public order upon the widest basis, and gives increased security for public freedom.

Whilst I have commented upon the economical advantages of an income-tax, I do not mean to imply that a general adoption of the income-tax would now be expedient, at least until the tax-paying public are better educated in the principles of political science. The

efficiency of laws depends essentially upon their conformity to the general expectation.[1] And unless a tax suit the previous habits and wishes of the people, and unless they be thoroughly convinced that they are not paying too highly for their government, discontent ensues. It is true, that, in reality, the laborious classes of the community, under the indirect system of taxation, absolutely pay more for their government than they would if the income-tax were universally adopted. They consequently suffer for their ignorance and impatience of taxation; and as long as they remain so ignorant, taxes must be collected in the easiest instead of the justest manner.

However, Education is spreading through the masses of the people to prepare them for the social changes that ensue in the progress of society. We are advancing in our social phases from system to system ever nearer to the truths of Political Science. We move slowly, it is true; but there is nothing of which we ought to be so convinced as the slowness of progress. In the scheme of the universe centuries are but seconds—ages produce the diamond. How long did the granite and marble slumber in darkness from the time they were fused in the primeval earth, until the time when the artist's skill wrought them into the Temple of Theseus, the Parthenon, the Colosseum, St. Peter's! So those who in the civilized countries of the world now cultivate the social sciences, are forming the materials from which some future statesman shall rear a Social Fabric, more enlightened, more equal, more just, better fitted for the advancement of Knowledge and the welfare of the People—the Progress of the civilized world.

It is true that in this great age of discoveries, of events, of conquests, of freedom, Progress is moving at an accelerated pace. In all the free civilized countries of the world, merit, unaided by birth or fortune, can now force its way to the very highest positions. Behold what a

[1] Bentham's "Civil Code," c. xvii.

future of glory, thought, intelligence, this principle has unfolded! "A high ambition entertained independently of social station, expansion and boldness in political thought; desire for intervention in the affairs of the realm; full consciousness of the dignity of man as a human being, and of the extent of his power, if he have capacity to exercise it—these are sentiments and dispositions altogether modern, the proceeds of modern civilization, and the fruits of that glorious and elastic generality which characterizes it."[1] The exertions formerly made only by privileged races or classes are now participated by all. The entire community, instead of a small section only, works for prosperity, for advancement. And, in consequence, the human race has within the last two centuries accomplished more material prosperity than in all the former ages. At the same time we may be assured what a grand career is yet before mankind, when we reflect how minute a portion of the earth is occupied by free civilized men. We are but in the infancy of Civilization. To continue this glorious Progress the first requisite is Social Order—Security.

11. Rights and duties arise between different states or their subjects, and form the province of International Law.

International Law is the rule which civilized independent societies observe towards one another in modern times. So far as it is capable of being enforced, it comes within the province of Positive Law. The term *international* is of recent origin. Dr. Zouch, in 1650, first distinguished *jus inter gentes* from the Roman jus gentium. D'Aguesseau, in 1757, distinguished *le droit entre les nations* from *le droit de nations*. Finally, Bentham, about the year 1790, invented the term international.

A great portion of what is called International Law, cannot be yet said to come under the denomination of Positive Law; and Political Law is in the same defective condition as International Law. No punishment can be

[1] Guizot's "History of Civilization," Lecture VII.

assigned for the offences of the Sovereign. *Quis custodiet ipsos custodes?* All that human wisdom has been able to devise is a system of precautions and indirect means, rather than a system of legislation ; so that a treaty between two nations is an obligation which does not possess the same force as a contract between two individuals; and the organization of International Law remains most incomplete. In this department of the science of Jurisprudence there is a great desideratum. The complete recognition of this branch of Jurisprudence will not take place until some international code be adopted by the principal civilized nations, promulgated by their authority, expounded by their international tribunals, and enforced by their combined strength in the last resort. Such a system partially exists in North America, where the States federally united submit to the supreme court of justice those quarrels which, in ancient times, or even now in the greater part of Europe could not be so peaceably arranged.

The happiness of the civilized nations of the human race would be fixed so far as it depends on law, if it were possible now to raise Political and International Laws to the rank of complete and organized sciences.

In accordance with the four-fold division of Positive Law, I divide Jurisprudence into four parts, termed respectively Civil, Criminal, Political, and International.

Civil Jurisprudence is concerned with those rights which are sufficiently protected by awarding compensation to the injured party upon any infringement of them. This compensation is afforded by civil process.

Criminal Jurisprudence punishes the violation of a right on behalf of the community in many cases where no compensation can be awarded. This punishment is effected by criminal process.

Political Jurisprudence embraces the province of government, and its relations to the people.

International Jurisprudence is separated into two divisions, public and private.

Public International Law defines and adjusts the

mutual rights and duties of the governments of different states.

Private International Law defines and adjusts the mutual rights and duties of individual citizens in different states. Within the sphere of International Law are included the greatest social and political problems of the age, amongst them the Right of Intervention—the Liberty of the Individual, his independence of his own Government and his Right to call for protection against wrong.

In point of expression the whole body of the Positive Law of a State has been usually divided into common and statute, or unwritten and written.

The Common Law is the collection of rules of civil conduct recognised by the members of the community without any positive interference of the legislative power.

The Statute Law is the law prescribed and promulgated in writing by the supreme power in the State.

The object of a statute is to fix the nature of a legal relation, by which the existence of that legal relation may be secured against error or caprice.

Both Common and Statute Law fall under the denomination of Positive Law. They both spring from the same authoritative force—the will of the community.—And custom is the sign by which we recognise that Common Law which arises and grows amongst a people as naturally and necessarily as their Language.

The Common Law has been called unwritten law,—*lex non scripta*—because without any interference of a legislative body it is a rule prescribed by the common consent and agreement of the community, as applicable to its different relations, and as capable of preserving the peace good order and harmony of society,—rendering to every man that which of right belongs to him.

The Common Law is not the production of the brain of one legislator, it is the growth of time and circumstance, the offspring of the necessities which the manners, religion, and circumstances of a nation have imposed.

Antecedent to all law enacted by the supreme legislative power; antecedent to the existence of the legislative body in a state, its inhabitants are governed by customs, spontaneously arising and binding by the force of public opinion. These ancient customs of the people must be recognised by the Judges, as much as the general expression of their will through their representatives in the Legislature, and must equally with the statutes of a realm be considered as Positive Law.

The sources of the Common Law are in the usages, habits, manners, and customs of a people; its seat is in the breast of the judges, who are its expositors. Every nation must of necessity have its Common Law, and that will be simple or complicated in its details according as the society is simple or complicated in its relations. Some practical rules suffice a wandering horde of savages; laws minute and nice in detail are demanded by the exigencies of a nation which agriculture and commerce have enriched, which civilization and the liberal arts have polished. The Common Law, therefore, is never stationary; but is modified and extended by analogy, construction, and custom, so as to embrace the new relations which spring from a change in the society. In modern times, the new principles which are argued by advocates and determined by judges, are principles of the Common Law, although they are not found in the old books. They are held to be immutable principles, which have slumbered in their repositories, because the occasion which called for their exposition has not arisen.

The Common Law system of England as administered by the judges of the land, consists in applying to new combinations of circumstances those rules of law which are derived from legal principles and judicial precedents. For the sake of attaining uniformity, consistency, and certainty, those rules must be applied by the judges to all cases which arise where they are not plainly unreasonable and inconvenient. And the judges are not at liberty to reject them, and to abandon all analogy to them in those cases to which such rules have not yet

been judicially applied, because the expounders of the law may consider that the rules are not so convenient and reasonable as those which they themselves could have devised.

It was important under the early feudal governments that the Judges should have been strictly tied up by precedent; but in the present day, in a free country such as England, with Judges of the independence and integrity attained in modern times in England; with the publicity of justice, and the liberty of the press as security against corruption, it does not seem necessary that the Judges should be so bound by the ancient strict rules of precedent, many of which might usefully be relaxed in the progress of society.

In the English phraseology another division of Law is into Common Law and Equity.

Equity is defined as the correction of strict Law wherever it is deficient owing to its universality. This definition has been adopted by Grotius and Puffendorf. Grotius says,—Equity is properly and simply a virtue of the will, corrective of that wherein the Law is deficient on account of its universality. That is equitable by which the law is corrected. Proprie vero et singulariter æquitas est virtus voluntatis, correctrix ejus, quo lex propter universalitatem deficit. Æquum id est quo lex corrigitur.[1] Thus, that species of law which may be termed unwritten, in the sense of not enacted by legislative authority, and which in England is called Equity, is at first wholly distinct from the Common Law, or that part of the immemorial and recognised custom of the realm which is *stricti juris;* and is always distinct from the Statute Law, except so far as the Statute Law in the progress of society professes to regulate the equitable jurisdiction. In its redress of the evils flowing from an unbending adherence to the rules of Common Law, Equity may be termed according to Schlegel's definition, the law qualified by historical circumstances. In respect

[1] Grotius de Æq. c. 1. s. 2.

of the Statute Law, the necessity for the application of Equity happens either against the design and inclination of the lawgiver, or with his consent. In the former case particular facts may have escaped his knowledge, or facts may arise in the progress of society requiring a less strict application of the law's unbending rule. In the latter case the legislator may be aware of all the facts; but from their number and complicity may be unable or unwilling to recite and provide for them. Cases admit of infinite varieties of circumstances: the law must be conceived in general terms.[1] So Mr. Charles Butler has said that Equity, as distinguished from Law, arises from the inability of human foresight to establish any rule which, however salutary in general, is not, in some particular cases, evidently unjust and oppressive.[2] And in this he has followed the Digest. Neither laws nor decrees of the Senate can be so written that all cases may be embraced wherever and whenever they may happen: but it is sufficient that those be included which most frequently occur. Neque leges neque senatûs consulta ita scribi possunt ut omnes casus quâ quandoque inciderint, comprehendantur: sed sufficit ea quæ plerumque accidunt contineri.[3]

The method of administering law in the early history of every people is technical. The system of pleading in the ancient Roman Law, the system of Common Law pleading in England, the formalities of written instruments required by statutes—all have frequently had the result of deciding cases, not upon the real merits, but upon the most technical subtleties. This arises from general incapacity and ignorance. Judges in the early stages of law in all countries are unable to decide upon conflicting evidence according to what is true and just: they endeavour to attain certainty. But in the progress of society the method of administering justice ceases to be technical, and endeavours to be equitable. Thus, in the history of the ancient Roman Law, the technical

[1] Taylor El. Civ. Law, p. 2. [2] Butler's Reminiscences, p. 37, 38.
[3] Dig. Lib. 1. tit. 3. l. 10.

system was finally suppressed: and the equitable jurisdiction of the Prætor became paramount. In New York, in the year 1850, the technical system has been, in a great measure, destroyed by the fusion of the Courts of Law and Equity. In England, in 1852, special pleading was abolished pursuant to the report of the Common Law Commissioners. And the union of Law and Equity in the Courts of England and Ireland is a project approved by every enlightened law reformer.

But the technical meaning of Equity, as used in the English Courts of Law, is different from that meaning which has been employed by moralists and jurists. Equity, as understood by English lawyers, is that portion of remedial justice which is exclusively administered by the Court of Chancery as contra-distinguished from that portion of remedial justice which is exclusively administered by the Courts of Common Law. The Courts of Common Law in England are Courts of Limited Jurisdiction, able to give relief only in certain prescribed forms of action, to which the party must resort to give him a remedy; and if there be no prescribed form to reach the case, he is at law remediless. But the forms in the Courts of Equity are flexible; and their decrees can be adjusted to all the varieties of circumstances which may arise. Thus, the Courts of Equity have had a two-fold function. They have relieved against the rigour of the Common Law Courts, as, for example, in the cases which they have held to be not within the spirit though within the letter of the Statute of Frauds. And they have also administered justice where it was impossible for the Common Law Courts so to do by reason of their limited jurisdiction and defective machinery. The most precise definition of a Court of Equity, as understood in England, Ireland, and the United States, is, that it is a Court having jurisdiction in the case of rights recognised and protected by the Positive Law of the country, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.

It is to be hoped that the division of the administration of justice between the Courts of Law and Equity will be abolished in England and Ireland, after the example of New York in 1850; and that every Court, as to the decision of rights, will be made a Court of unlimited jurisdiction; although different processes may be adopted to enforce such rights; and some Courts may decide questions of larger pecuniary importance than others.

12. Historically, Law thus arises amongst a people. First the Common Law, like their language, springs from their common consciousness. That primitive customary law is antecedent to all formal legislation. Next the Statute Law in its origin in every state embraces public law and defines the constitution. In the development of society law becomes two-fold. Its primitive fundamental principles still continue to live in the common consciousness of the people. Its more accurate formation and application to particular cases become the particular vocation of the class of lawyers. Finally, the Statute Law is busied with details. It corrects the errors and supplies the deficiencies of the Common Law in private matters.

In the last stage of Legislation in a State, the principle of Codification appears. It appears to be a natural law that whilst a nation is rapidly progressing in Wealth, Knowledge, and Civilization, it is impossible to codify the Laws. Whilst the necessary preparation for a Digest is taking place, already has the natural progress outstripped the legislators. When a complete code of Laws is possible for a nation, its progress must have been arrested; it must already have reached that maturity in which further development becomes difficult if not impossible. Historical examples are the code Justinian and the code Napoleon. From the consolidation of the Roman Law under Justinian, the development of the Roman Law ceased: the development of the Roman civilization had already ceased. France now appears stationary in wealth and population.

Codification is attended with many dangers. There is the risk of error in definitions. There is the risk of perpetuity being given to those errors by the legislative enactment, so as to preclude their correction upon discovery, as under the present mode of administering the Common Law in England. Definitions in a statute may be useful, when they contain a command or a prohibition, when their object is to determine acts, which individuals are bound to perform, or to abstain from; but when they have no other object than to make known the nature of things, they are useless and dangerous, and should be left to science. In codification there is also the danger of cramping the development of the scientific principles of the Common Law, and of retarding the adoption of advanced rules of justice more consistent with the public welfare and the progress of society.

It is impossible to codify the laws of a nation in such a manner as that no change will be necessary. The rights of the different classes of society are continually changing, and the narrowness of human wisdom cannot foresee the cases which time discloses.

Nor does the conversion of Common Law into Statute Law render it absolutely certain. It is still exposed to the risks of ambiguous construction arising from the natural imperfection of language as the representative of thought and from the imperfect use of language.

But by arrangement and classification the disadvantages of the accumulations of books and of the judgments of the courts may be diminished.

The Statute Law may be improved by a more scientific method of enactment and the skilful use of appropriate language. The carelessness of former legislation may be remedied by a strict definition of terms, and by a strict adherence to the judicial phraseology as having a fixed and generally recognised if not technical meaning.

The wants of society are so varied, the communication of men so active, their interests so multiplied, and their relations so extended, that it is impossible for the legislator to foresee all. In the materials which par-

ticularly fix his attention, there is a crowd of details which escape him, or which are too contradictory or fleeting to become the object of a legal test. It is impossible to chain the action of time, to oppose the course of events, or prevent the insensible change of manners. It is impossible to calculate in advance what experience alone can reveal. A code, however complete it may appear, is no sooner finished than a thousand unexpected questions present themselves to the magistrate. Laws once digested remain as they have been written. Men, on the contrary, never repose—they always act; and this movement which never stops, and the effects of which are differently modified by different circumstances produce at each instant some new combination, some new fact, some new result. Many things are then necessarily abandoned to the empire of custom, to the discussion of learned men, and to the arbitrament of the judges. The duty of the Law is to fix, with enlarged views, the general maxims of Right, to establish principles fertile in their consequences, and not to descend into the detail of the questions which may arise upon each matter. It is for the magistrate and the lawyer, penetrated with the spirit of the laws, to direct the application of them. Hence amongst all polished nations, in addition to the laws made by the legislature, a store of maxims, decisions and doctrines is daily promulgated by practice and by judicial duties. The Professors of the Law are reproached with having multiplied subtleties, compilations, and commentaries. This reproach may be well founded. But what art, what science does not deserve it? Must a particular class of men be accused of what is only the general tendency of the human mind. There are times when we are condemned to ignorance because we have not books; there are others where instruction is difficult because we have too many. Excess in commentary, discussion, and authorship is to be pardoned above all in Jurisprudence. We cannot hesitate to believe this if we reflect on the innumerable ties which bind citizens. There is a constant development and a

successive progression of the objects with which the magistrate and the jurisconsult are obliged to busy themselves. The course of events modifies in a thousand ways the social relations. He who blames subtleties and commentaries becomes, in an individual cause, the subtle, fastidious commentator. It would be without doubt desirable that all matters should be regulated by laws. But in default of a precise text on each matter, an ancient usage, constant and well established, an uninterrupted current of similar decisions, an opinion or a received maxim, holds the place of law. When we are directed by nothing that is established or known; when we treat of an absolutely novel fact, we ascend to the principles of natural justice.

Bentham enumerates four conditions which ought to belong to a code of Laws, and which ought to be regarded in its Division.

The first condition of the code should be the greatest happiness of the greatest number.

It should have for its end the general interest; and if this condition has been satisfied in the political code, that is, in the code which establishes the different powers of the state, it will be easy to follow it up in all the other branches of legislation.

The second condition is *integrality;* that is to say, it ought to be complete, or, in other words, embrace all the legal obligations to which a citizen should be subjected.

The third condition is imperfectly expressed by the word *method.* Bentham means by this, not only precision of language and clearness of style, but such an arrangement as would allow all those interested in it easily to acquire a knowledge of the law. All that is included under this comprehensive head is expressed by the word *cognoscibility;* that is to say, the law should have a great *aptitude to be known.*

There is no one word which can express the fourth condition to be satisfied by a body of laws. The meaning must be conveyed by a periphrasis. Each law should be accompanied by a commentary or exposition of the

grounds on which the law is founded, showing what relation it bears to general utility. This commentary is, as it were, a justification of the law; *justifiability* of the law would, perhaps, be the proper word to express this characteristic of good laws; since those only are good for which we can give good reasons.[1]

A code of Laws is like a vast forest; the more it is divided the better it is known.

The first principle of division in a code consists in separating laws of universal interest from those of special or individual interest.

There are some laws with which every man should always be acquainted, and there are others which are only required on certain occasions; in other words, there are laws of a permanent, and others of a temporary and occasional interest.

The penal code is the first in importance; all human actions which are the object of law are necessarily included in it. What is called the civil law is only a collection of explanations, or, in other words, an exposition of what is contained in the penal code. Thus, the penal code prohibits from taking an article of property to which the taker has no right; the civil code explains the different circumstances which give such right, or make any thing property. The penal code forbids adultery; the civil treats of all that concerns the marriage state, and the reciprocal obligations of man and wife.

13. The development of Jurisprudence has arisen in two ways,—from the individual labours of learned men, and from the natural progress of society. Thus, one important branch of law has sprung in modern times from the necessities of commercial intercourse. International Law is entirely the offspring of modern civilization; and is the latest important discovery in political science. Communities which anciently admitted of no political superior upon the earth,—no law to guide them in their

[1] Dumont's Bentham (Part I. Codification. Hancock and Ingram's edition: Dublin 1854).

intercourse with foreigners, except the dictates of capricious ambition,—are now willing to regard themselves as subject to certain rules, the observance of which is expedient for the interests of all. In ancient times International Law had no existence. But from the number of civilized states in Modern Europe,—of nearly equal power, of similar political and ecclesiastical institutions, and united in the friendly ties of commerce,—a set of rules has been adopted in diplomatic intercourse and the settlement of international disputes. International Law, however, is only Positive Law, in so far as it will be supported by an appeal to arms in the last resort. And although the appeal to arms may not be resorted to in every case, yet the fear of incurring general hostility operates upon nations, keeping them within the rules of national comity. The term law of nations, is used by Vattel to designate the science which teaches the rights subsisting between nations and states, and the obligations correspondent to those rights. The Law of Nations teaches the rule which ought to be observed. International Law is the rule observed. The origin and progress of International Law is in itself a remarkable step in the march of civilization. Nations now begin to acknowledge their subjection to laws in conformity with natural justice and reason, as in the very origin of society individuals acknowledge themselves so bound. And the development of International Law will proceed amongst the civilized nations of the earth until citizens can enjoy, in foreign countries, all the rights which they enjoy in their own. There is no good reason that a malefactor, by changing his domicile, should evade justice. There is no good reason that a debt incurred in one civilized country should not be recovered with the same facilities in all others.

The great desideratum in International Law is a code adopted by the civilized nations of the earth, and to be enforced by their combined strength in the last resort. The practicability of such a scheme is exemplified on a small scale in the recent enactment of the law on bills

of exchange for all Germany, to replace the numerous laws which had previously existed in all the several independent States. Prussia, Hungary, Austria, Baden, Bavaria, Saxony, and all the minor States of Germany, had their distinct laws of bills of exchange. But at a Congress held at Leipsic in 1848, consisting of bankers and lawyers from all parts of Germany and some of the Austrian provinces, a general law of bills of exchange was established, which came into operation in 1849.[1] This example must in time be followed, and upon a more extensive scale.

The complete development of International Law can only take place from the influence of commerce, which unites the human family by the strongest tie,—the desire of supplying mutual wants. Commerce demands an international code for the civilized nations of the earth; so that the law of partnership, insurance, bills of exchange, shipping, and bankruptcy should be uniform. Commerce demands that there should be throughout the civilized world a uniform standard of the precious metals, and a uniform system of coinage. Commerce demands a uniform system of taxation, so long at least as the indirect system of taxation may be retained. Commerce demands that debts should be recovered with equal facility in every country, irrespective of the place of contract. Literature demands that the property in its works should be secured by international copyright. Art demands that the property in its inventions should be secured by an international law of patents. If ever there shall exist a common coinage and uniform taxation for the civilized world, with international courts of justice whose jurisdiction shall extend over continents, civilization will owe these advantages to the origin and progress of International Law. Then, to use the words of Cicero :—There shall not be one law at Rome, another at Athens; one now, another hereafter; but one and the same law shall obtain at all places and times;—Non erit alia lex Romæ, alia Athenis; alia nunc alia posthac; sed

[1] Leone Levi's Commercial Law, vol. i.

et apud omnes gentes, et omnia tempora una eademque lex obtinebit.

The study of Jurisprudence will aid in the most important degree the development of International Law; and will assist the progress of law reform at home. Certainly, if there were ever an age in which it was important for gentlemen to be acquainted with the principles of Jurisprudence it is the age in which we live. In matters of law and government *stare super antiquas vias* is no longer held to be the leading maxim. In England almost the whole legal world is toiling in the paths of law reform. And the labours of other countries are no longer unknown and despised. Laing and Kay travel Europe, and inform us how the feudal system of real property, and many of its attendant institutions, are abolished in some of the seats of the oldest civilizations. Certainly the experiment of agriculture in the hands of freemen, in farms of moderate extent belonging to themselves, is now being tried upon the most extensive scale in Continental Europe. And it is at least worthy of our attention to study on scientific principles these great phenomena, with the view of introducing into the English real property reforms the best portions of the new landed system of modern Europe.

Next to the real property reforms the new systems of national education attract our notice. It is from the combination of natural powers that man derives his civilization. Having acquired a certain amount of knowledge, it is partly optional with him whether he will make use of the powers of nature, or obstinately struggle against them. And so availing themselves of their natural capabilities, some races of superior energy have arrived at a partially developed civilization. But the cultivated energy of human thought shall yet develop greater results. Now, in almost every civilized country there exists a vast number of paupers, for whom civilization has been in vain, to whom it has scarcely brought any benefit. Yet these are not permitted to rage with their original barbarity. The Law provides

for offenders, police, judges, the prison, the scourge, and the gallows. Some States, a little further advanced in social knowledge, try also the effects of national education. They act thus upon the soundest principles of political science. In moral and physical nature alike over the earth we see the results of cultivation. In physical nature, a large extent of country left as a marsh or swampy forest in its original rudeness shelters beasts of prey, herds noxious vermin, and from its baleful precincts spreads pestilence over the adjacent country. Time advances, and with it the steps of civilized man. He fells the trees which kept the sunlight from drying the ground. He drains the marshes, which speedily bear the abundant harvests. The wild beasts, deprived of shelter, perish from the place no longer fit for their habitation; the dry and cultivated ground no longer breeds fevers and agues. This spectacle, either in its progress or in its fruits, is witnessed over the entire earth. In moral nature we now see the minds of the lowest class in society left stagnant and disfigured by moral pollution and ignorance. As the earth left to itself becomes waste and tangled,—the pestilential abode of reptiles and wild beasts, so the mind uncultivated produces crime and pollution. But in both cases, if we would perform our duty to ourselves and society, we must cultivate; we must cultivate the savage earth, we must cultivate the ignorant minds of the poor. If we wish the earth to be wholesome and fruitful, it must be drained and cultivated. So, too, with the wholesome crop of knowledge we must banish the bitter thorns of ignorance. If we wish the poor to take their places as citizens in society, we must educate them, and, by means of laws in conformity with natural justice and reason, place the poor in a condition wherein they may use that education, and earn their bread. There can be no more gratifying proof of human progress than the teaching of modern political science, that the true way to provide for the general happiness is to give all citizens an interest in the prosperity of the nation, to leave trade

and labour free, and to give the humblest a good education. And the countries which have emancipated and given independence and education to the lower classes, have not only given liberty to them, but security to all.

Science is often abused, as not being practical; but it will not be denied that such questions as these are practical.

So also, since the arts of Sculpture and Painting have been united with Manufactures, and aid in their development, is it important to consider on what principle the Laws of civilized nations now refuse to the inventor the complete property in his works. Schools of Design are endowed and encouraged by patrons of the Fine Arts. Yet in the British Islands the ingenious mechanician, who invents new machinery to cheapen production and facilitate labour,—the artist, who with plastic skill designs the most exquisite forms for the furniture of our houses,—the painter, who stamps with beauty the plain creations of the loom, and enables Manchester to find a market in China and India,—all are by the present laws denied the full property in the works of their hands and brains. Is it not worth while to study why this is so, and upon what principle this is to be remedied?

The English Law, with its excellent characteristics,—trial by jury, *vivâ voce* evidence, and publicity in every stage of the proceedings,—has spread over a vast portion of the earth. In North America the English Law has crossed the Alleghanies and the Rocky Mountains with the emigrants; and on the shores of the Pacific the representative government, the municipal systems, and the Common Law of England give strength and liberty to nations. So, if we turn to India or Australia, the English lawyers may say,—

> "Quæ regio in terris nostri non plena laboris
> Est?"

In some of these new countries improvements have been made upon the Common Law, which we are slow to adopt at home. The development of the Common Law is proceeding at the most rapid rate in the United

States. And our most energetic law-reformers may borrow useful hints from the latest Code of New York. There, the distinction in Procedure between Law and Equity has been abolished. And not only in the department of legal reform, but also in legal authorship, the United States of late have surpassed England. In England recently, with perhaps the single exception of John William Smith, there have been no legal authors such as Kent, Story, and Greenleaf have been in America. This may be attributed to the superior legal education which the American lawyers receive, and to the schools of law established throughout the United States.

The study of Jurisprudence is not merely concerned with the permanent progress of the human race and the amelioration of society. Many believe such ideas to be visionary. But there can be nothing more strictly practical than the consideration of such questions as the legal burdens which press upon the owners and occupiers of land, and prevent its free transfer,—the reasons for the education of the poor, and the best method to accomplish it,—the consideration of the laws which deprive inventors of the complete property in their works, —the questions of international copyright, an international law of patents, and an international commercial code,—and the reform of legal procedure. These things concern the prosperity of the entire community. And it is expedient to consider them upon scientific principles.

END OF BOOK I.

BOOK II.

THE GREEK AND ROMAN JURISPRUDENCE.

Φυσει γάρ ἀνθρώπος πολίτικον ζῶον.
"Man is by nature a political animal."—*Aristotle.*

"La seconda fu la Giurisprudenza eroica di cautelarsi con certe propie parole, qual è la sapienza di Ulisse; il quale appo Omero sempre parla sì accorto, che consiegua la propostasi utilità, serbata sempre la propietà delle sue parole. Onde tutta la riputazione de' giureconsulti romani antichi consisteva in quel lor *cavere;* e quel loro *de jure respondere* pur altro non era che cautelar coloro ch' avevano da sperimentar in giudizio la lor ragione, d' esporre al Pretore i fatti così circostanziati, che le formole dell' azioni vi cadessero sopra a livello, talchè il Pretore non potesse loro niegarle. Così a' tempi barbari ritornati tutta la riputazion de' dottori era in trovar cautele d' intorno a' contratti o ultime volontà, ed in saper formare domande di ragione ed articoli, ch' era appunto il *cavere*, e *de jure respondere* de' romani giureconsulti."

Vico: Scienza Nuova, lib. iv., opere vol. v., 508.

"The second was the Heroic Jurisprudence composed of cautious forms with certain appropriate words. Such was the wisdom of Ulysses, who, according to Homer, always spoke so craftily as to attain his proposed end, preserving, nevertheless, the propriety of his words. Thus, all the skill of the ancient Roman jurists was expressed in the word *cavere*. And what they termed de jure respondere was nothing but advice given to those who went to law to the end that they should present the facts in such a fashion that the formulas of actions might agree with them, so that the prætor could not refuse them. Similarly on the return of the barbarous times all the skill of the doctors consisted in finding precautionary forms for the assurance of contracts and wills, and the means to elude them; all which recalls the *cavere* and the *de jure respondere* of the Roman jurists."

Vico: The New Science, book 4, works, vol. v., 508.

BOOK II.

THE GREEK AND ROMAN JURISPRUDENCE.

CHAPTER I.

POLITICAL PHILOSOPHY IN GREECE.

AUTHORITIES:—Van Heusde, Initia Philosophiæ Platonicæ, Leyden, 1842, 8vo.; Schleiermacher, Introduction to the Dialogues of Plato (Dobson's Translation, Cambridge, 1826, 8vo.); Tennemann's System of the Platonic Philosophy, Leipsic, 1792, 4 vols. 4to.; Geddes' Essay on the Composition and Manner of the Writings of the Ancients, particularly Plato, Glasgow, 1748, 8vo.; Ritter's History of Ancient Philosophy; Tennemann's Manual of Philosophy, London, Bohn, 1852; Janet, Histoire de la Philosophie Morale et Politique, Paris, 2 vols. 8vo., 1858.

1. Great men in all ages have cultivated Jurisprudence. Most of our modern legal civilization is the result of the labours of those who from the original rudeness of savage life have developed the principles of Civil and Political Right. A true social idea, says Lamartine,[1] descended from Heaven on humanity never disappears. Once that it has germinated in certain right hearts, sound and logical minds, it bears within itself something vital, divine, immortal, which never more perishes in its entirety. Passions, vile interests, ignorance, prejudices, may crush it under their feet, may mutilate it under the sabre or hatchet; its fruits are retarded for ages; but the hand of Providence is full of ages; at the destined time, the living idea of which the seed has been spread and multiplied even by the storms, bursts forth at once in the minds of all.

In the twilight of history the magnificent despotisms of the East appear. The immobility of institutions is the chief Oriental characteristic. India and China respectively have made but little progress in morals and

[1] Essai sur La Politique Rationelle.

legislation since Menu and Confucius flourished. And in those countries, so long celebrated for partial wealth and refinement, men endure the tyranny under which their ancestors laboured for ages. We turn from the stagnant mind of the East to the active intellect of Greece.

Throughout the annals of philosophy and legislation we find the constant aspiration to the great, the beautiful, the just,—in a word, to Progress. Greece for a time first manifested this aspiration with the greatest ardour. It is true that decay and barbarism followed there. But the decay and barbarism were only for the degenerate Greeks. The decay and barbarism were not for Rome which received the fruits of the Grecian civilization; nor were the decay and barbarism ultimately for humanity, which to this day preserves, as a treasure of inestimable value, some of the principles evolved by the legislators and philosophers of Greece.

In reading the political works of the ancient Greeks, we are not to judge them by modern writings. Humanity, in the conception of those philosophers, was a finished work, though we now are but beginning to understand that the world has lived only a fraction of its existence. Chivalry, Loyalty, the Purity of Woman, and her influence on society were things unknown to the old Greeks. Nulla est ars quæ singulari consummata sit ingenio—no art is perfected by one genius. The jurists, publicists, legislators, statesmen of the present age, all have before them the historical experience of twenty-two centuries since Plato wrote. From that time the human race has been labouring, not only in the academy and lyceum of the ancient, in the libraries and universities of the modern schools, but also in the working life of government, legislation, and war, to solve the great question how temporal peace and happiness may best be secured. The triumphs of Alexander over Oriental despotism,—the flourishing civilization of Egypt under the Ptolemies,—the progress of the Roman Empire, and its splendid cultivation of the laws of civil society,—the feudal system,—the history of the Italian republics,—the history

of the great modern nations which now maintain the progress of the civilized world—all supply us with a larger induction than Plato ever dreamed of. The brute matter of human existence is wrought into society only by length of time. A great and free state is the work of many ages, of stupendous characters, of watchful senates, of sages and heroes. To form, support, and bring such to maturity, the invention of nature must be stretched for thousands of years. We reap the fruits of all the political experiments which have cost to our ancestors time, care, and blood.

With difficulty do we picture to ourselves the Athenian civilization in which Plato lived. Some arts were then developed to a height since unattained by human genius and industry. No more do we rival the poetry of Homer or Sophocles, the oratory of Demosthenes or Æschines, the sculpture of Phidias, the painting of Appelles. But this grand cultivation of the fine arts has thrown a gloss over the traces of barbarism. Three-fourths of the population of Greece were slaves; both Plato and Aristotle justify slavery on the plea of necessity. Marriage as now understood was unknown; women were still socially slaves. In Greece the highest social types of women are Lais and Aspasia; although their poetry and fiction show that in the future marriage was anticipated. Piracy in the heroic times was an honourable profession. Later, the partially civilized Oriental nations were to the Hellenes barbarians. Even in Greece, and between Greeks, war was carried on with a ferocity now unknown in international contests between civilized nations. When one of the petty Grecian cities was taken by the enemy, it was no unusual thing that it should be burned to ashes, and all the surviving inhabitants sold as slaves. When a citizen of Greece fought, it was with the consciousness that if defeated, in all probability he would be butchered on the smoking ruins of his hearth. Such a fate as this was suffered by some of the noblest Grecian cities, which fought the bravest against the Persian, and in which were nurtured the germs of Euro-

pean polity and civilization. Hence we must consider it a splendid effort of the human intellect that Plato in his age wrote such works, enouncing in the most felicitous language political truths for all time; although many of his dialogues, even those which explain the most vital parts of his system, are disfigured by theories and ideas borrowed from the political experiments made by Grecian society, and which long have been eliminated from civilization by the good sense of mankind.

Among the general ideas which govern the activity of man, appear the idea of the Useful, producing mathematics, physics, industry, political economy; the idea of the Beautiful, producing Art; and the idea of the Just, producing Civil Society, the State, Jurisprudence. The Just is one of those ideas which constitute the glory of human nature. Man perceives it in the beginning; but he perceives it only as a lightning flash amidst the profound gloom of his early passions; he sees it unceasingly violated, and at every moment effaced by the inevitable disorder of conflicting interests. What Rousseau has called society in a state of nature, is nothing more than a state of war, where the right of the strongest reigns. But Justice established constitutes the State. The use of the State is to cause Justice to be respected through the means of force; and it acts in conformity with an idea which is inherent in that of Justice—that is, that injustice ought not only to be repressed but punished. Hence arises civil and political society; which is nothing else than Justice acting by means of that legal order which the State represents. The State, however, ought to take no notice of the infinite variety of human elements which were conflicting amidst the confusion and chaos of natural society; it does not embrace the whole man; it considers him only in relation to the ideas of the Just and Unjust.[1]

But the province of Justice was not so easily determined in ancient times. Even at this moment, the province of Government is the subject of the keenest in-

[1] Victor Cousin.

quisitions—one party of philosophers maintaining that the duty of Government is simply to maintain justice and order, another investing the Government with the direction of the whole progressive force of the people. The solution of this question is one of the most important for the happiness of mankind.

The triumph of all science is but to verify facts, and to draw from their connexion the inductions that reveal the laws to be obeyed by man under pain of being the more miserable the less he shall know or obey them. It has long been observed that the practice of a science always precedes the science itself. And with this branch of Sociology, as with all others, the art whose important principles and general rules it demonstrates was practised long before the existence of the science of Jurisprudence was ever suspected. Minos gave laws to Crete, Lycurgus to Sparta, Solon to Athens, Pythagoras to Southern Italy; but these different legislators were men rather distinguished by their strength of character, by the knowledge which they had of the state of manners, of the usages, and of the wants of the different nations for whom their laws were destined, than by the profundity of their general political views. Before their time vast monarchies had existed which have no history but the revolutions of the reigning houses. And if Minos be the first legislator whom history mentions, the cause of this honourable distinction is known. "This legislator," says the historian Ephorus cited by Strabo, "appears to have regarded liberty as the greatest good for civil societies; because that it alone can guarantee to individuals the property in the advantages which they enjoy; whilst in slavery all belongs to the man who governs, nothing to the governed." Unquestionably to these sound ideas on society and government, to the communications established between the most eminent men by their talents, to the influence more or less direct which each of them exercised over his fellow-citizens, the Greeks owed the means of coming with glory out of the terrible crisis of the Persian invasion. The energy which they

employed in defence of their liberty was the result of their ardent love of country, and of their profound consciousness of their rights as citizens of a free state.[1]

2. Socrates, B.C. 469–400.

Four great schools of philosophy flourished in ancient Greece anterior to the time of Socrates: the Ionic, founded by Thales; the Italic, founded by Pythagoras; the Eleatic, founded by Xenophanes; and the Atomic, founded by Leucippus and Democritus. Each of these four sects was distinguished for the boldness of its hypotheses in attempting to account for the origin of the universe; and they differed from each other mainly in the principles of their solution of this one problem. The magnificence of the world without withdrew philosophers from contemplating the world within. Yet, it would be a mistake to say, as is sometimes said, that their speculations were exclusively cosmological. Thales was not a mere promulgator of physical hypotheses; but appears to have been a deep thinker, and in fact the first speculative philosopher of Greece.

The aphorism traditionally attributed to him, "Know thyself," reveals this reflective tendency. The author of the Magna Moralia again informs us that "the first to attempt the subject of Moral Philosophy was Pythagoras. His method, however, now appears absurd, for he made virtue a number, justice a cube." To Pythagoras also has been ascribed what Dugald Stewart pronounces to be "the oldest definition of Virtue of which we have any account, and the most unexceptionable, perhaps, which is yet to be found in any system of philosophy—Ἕξις τῶν δέοντος—the Habit of Duty."

To the sect of the early natural philosophers of Greece succeeded the sophists. This class of thinkers belongs to a peculiar stage in human progress—to a period of criticism or transition. The previous sects of philosophers had failed to find any platform of truth on

[1] Thurot, Discours Préliminaire.

which the reason of man could rest satisfied. Their labours had ended and no fruits had been garnered into the treasury of knowledge. They, too, had no successors in their endeavours to solve the problem of the universe. The different views of nature, taken by the several sects, had all proved unsatisfactory, and yet seemed to have left no other possible view. This the sophists saw. The sophists were, in truth, the offspring of the thinking of these sects of naturalists. Their parentage is shown in the fact that in general they were materialists. The common doctrine of the sophists was that doubt attaches to every opinion, and that it is impossible to find certainty in any thing. They were thorough sceptics.

Here, then, begins the great era of ancient Moral Philosophy. Socrates is the leader in this period of the struggles of the mind of man with the difficulties of knowing theoretically—of construing to one's consciousness what he feels and sees within and without himself; his aim was to lay down certain laws by which men might be guided, as rational and accountable beings, to the pursuit of objects directly related to their spiritual nature, and to such a subjection of their lower faculties as should render them subservient and useful to the higher. "He was the first," says Cicero, "who invited Philosophy down from heaven, gave her a home in cities, introduced her into our domestic life, and led her to speculate on life and manners, and on all things good and evil." Baffled in his attempt to solve the mysteries of the world without, he turned his attention to the world within; for physics he substituted morals; the certitude which he failed to gain respecting the operations of nature had not shaken his conviction of the certitude of the moral truths which his conscience irresistibly impressed upon his attention. The world of sense might be fleeting and deceptive. The truths of conscience were eternal, immutable, evident. These he opposed to the scepticism of the sophists. Moral certitude was the rock upon which his shipwrecked soul was cast. From its height he could survey the world and his relation to it.

The morality of Socrates was, in fact, reared upon the basis of religion; and his lessons, communicated to us by his two most distinguished pupils, Plato and Xenophon, show that his ideas of the nature, position, and duties of man approach closely to the standard of Christian Ethics. The complete absence of selfishness distinguishes the Socratic theory. The principles of virtuous conduct which are common to all mankind were, according to this wise and good man, laws of God; and the argument by which he supported this opinion was, that no man departs from these principles with impunity.

"It is frequently possible," says he, "for men to screen themselves from the penalty of human laws; but no man can be unjust or ungrateful without suffering for his crime; hence I conclude that these laws must have proceeded from a more excellent legislator than man." He taught that true felicity is not to be derived from external possessions, but from wisdom, which consists in the knowledge and practice of virtue; that the cultivation of virtuous manners is necessarily attended with pleasure as well as profit; that the honest man alone is happy; and that it is absurd to attempt to separate things which in their nature are so united as virtue and interest.

Socrates—the first citizen of the world—incited the intellect of Greece along the path of political and ethical philosophy. He talked only—he wrote nothing; but his opinions are preserved and matured in the works of Plato. Aristotle next took up the inquiry; and with a keener and harder intellect avoided many of the errors into which Plato fell. It is necessary thus to follow out the philosophy of the Socratic schools; no system, if completely isolated, can be understood. A system cannot be thoroughly comprehended until we know all the consequences which have actually followed, and which it is the business of history to trace from it in the application of principles.

With the first sages of Greece the subject of examination had been Nature, or the Kosmos, as one undistinguished whole. This vast and undefined problem had

occupied the attention of the Ionic as well as the Eleatic philosophers, Pythagoras as well as Empedocles. However, under the cultivation of the Sophists, the division of labour was first applied to the sciences. It appears strange to us, knowing the degree of perfection to which the study of some of the physical sciences has advanced, that Socrates was convinced that the Gods intended the machinery by which they brought about the astronomical and other physical results to remain unknown, and that it was impious as well as useless to pry into their secrets. He therefore devoted himself to consider the rules and purposes of human life, and was the first to proclaim that "the proper study of mankind is man." He consequently desired to confine the studies of his hearers to human matters as distinguished from divine—the latter comprehending astronomy and physics. "Socrates," says Xenophon, in the "Memorabilia," "continued incessantly discussing human affairs, investigating: What is piety?—What impiety?—What is the honourable and the base?—What is the just and the unjust?—What is temperance?—What is courage or cowardice?—What is a city?—What is the character fit for a citizen?—What is authority over man?—What is the character befitting the exercise of such authority?—and other similar questions. Men who knew these matters he accounted good and honourable; men who were ignorant of them he assimilated to slaves." The method of the Socratic examination of these important subjects was strongly to contrast the state of knowledge on the general topics of Man and Society with the state of knowledge possessed by men of their individual handicrafts and professions. Civilized men devoted to different pursuits, in the progress of the division of labour, learn accurately the matters relating to their several professions; and in the subject matter of their professions are authorities, so that no one presumes to interfere with them; but in matters of social philosophy, all are as well ignorant and confident. Since the age of Socrates and Plato, however, a considerable advance has been made. Then, not only

amongst the generality of civilized men were the ideas respecting morals, laws, and social economy, vague and unscientific; but also the ideas respecting physical nature were obscure, supernatural. A god was in every hill, in every fountain; the sun and moon were divinities—their motions and magnitudes as yet uncalculated with accuracy.

In the nineteenth century, as regards the physical sciences, men are content to admit their original ignorance, to seek for knowledge from the teacher, and acknowledge his proofs. And the time will arrive when the mental sciences will be brought to a similar degree of perfection, and their truths similarly admitted. Socrates was unable to draw such a comparison as is now possible for a student of the social sciences. But the comparison which he actually took, borrowed from the special trades and professions, led to one important result. He first saw and showed that as in each art or profession there is an end to be obtained, so in the general art of human living and society there is a grand and comprehensive end, the security and happiness, as far as practicable, of each and all persons in the society.[1] Socrates resolved all virtue into knowledge, all vice into ignorance. To do right was the only way to be happy, or, at least, to avoid as much unhappiness as possible. Now this was precisely what every one wished for and aimed at, only that many persons from ignorance took the wrong road, and no man was always wise enough to take the right. But as no man was willingly his own enemy, so no man ever did wrong willingly; it was because he was not fully or correctly informed of the consequences of his own actions; so that the proper remedy to apply was enlarged teaching of consequences and improved judgment.[2]

The method of Socrates was composed of two distinct parts—self-examination and the search after definitions. He did not employ these two processes with any perfect accuracy. Complete scientific methods belong only to very advanced stages of philosophy and society. But

[1] Grote's History of Greece, vol. viii. [2] Cicero, De Oratore, i. 47.

he certainly knew, understood, and practised both the method of internal observation and the method of definitions. He transformed into a philosophical principle the celebrated maxim, know thyself—*γνῶθι σεαυτὸν*—and declared that only in the practice of it could man be just and wise.

The search after definitions was with Socrates a consequence of self-knowledge. Perfect knowledge cannot exist without being able to give an account of our ideas, to distinguish between them, and to define them.

Socrates has defined justice as the knowledge of what has been prescribed by the Laws. But there are two sorts of Laws. The first are those which citizens make of common accord in their own country. Justice in this first sense is only obedience to the Laws of the country. It is a part of patriotism.

But the theory of Justice was elevated, when, in place of considering it as obedience to the laws of the state, Socrates displayed Justice regulated by superior laws—laws not written—laws depending not on the caprice of a people, but on the will of the Gods. The first change with men and states; the second prescribe the same things at all times, to all men, in all countries.

In his theory of Justice Socrates excelled all his cotemporaries. M. Janet has observed that in two points Socrates has surpassed all antiquity—in his ideas upon the Family, and Labour. Socrates had a far more exalted idea of domestic life than Plato. He recognised the moral equality of the two sexes—an equality which permits the ineffaceable differences of nature to exist. He gives the most admirable pictures of the Family, the Wife, and the Mother. This sentiment of domestic life led Socrates to understand another truth which antiquity never comprehended—the dignity of Labour, not merely intellectual and political labour, but the common working labour of everyday life. Socrates equally with Napoleon respected the burthen. "Whom shall we call wise?" said he. "Are they the idle, or those occupied with useful works? Whom shall we call just? the workers,

or those who with folded arms dream their lives away?" Socrates relieved labour from the idea of servility attached to it by the ancients. And thus, without knowing it, he attacked slavery at its source.

In Science, Philosophy owes to Socrates its true principle—know thyself—and its true method, criticism and analysis.

The many-sided life of Socrates gave an impulse, as is well known, to a variety of schools of philosophy. It is usual to divide these into the imperfect and the perfect Socratecists; the Megarians, who represented only the dialectic element in Socrates, and the Cynics and Cyrenaics, who represented each a different phase of his ethical tradition, being considered as the imperfect Socratecists; whilst Plato is considered as the full representative and natural development of all sides of his master's thought. An account of the Megarian school belongs rather to the history of Metaphysics; the Cynical and Cyrenaic philosophies were each rather a mode of life than an abstract theory or system. It is instructive, however, to see the various points of view that it is possible to take with regard to life; and each of these schools was in fact an exaggeration of a peculiar aspect of the life of Socrates. If we abstract all the Platonic picture of the urbanity, the happy humour, and at the same time the sublime thought of Socrates, and think only of the barefooted old man, indefatigably disputing in the open streets, and setting himself against society, we recognise in him the first of the Cynics. Again, if we think of him to whom all circumstances seemed indifferent, who spoke of virtue as the science of the conduct of life, and seemed at times to identify pleasure with the good, we can understand how Aristippus, the follower of Socrates, was also founder of the Cyrenaic sect. In the Cynical philosophy there was little that was positive—there was no actual contribution to ethical science. But the whole Cynical tone which proclaimed the value of action and the importance of the individual Will was an indication of the practical and moral direction which

thought had now taken; and it prepared the way for the partial discussion of the problems of the Will by Aristotle, and for their more full consideration among the Stoics. Crates, the disciple of Diogenes, was the master of Zeno. In the Cyrenaic system, again, we find a bold, logical following out of a particular view. In this respect the system is remarkable, for it is the first of its kind. The Sophists had trifled with such views, and had not followed them out. In the prominence given to the subject of Pleasure in the Ethical systems both of Plato and Aristotle, we may trace the effect of the Cyrenaic impulse.

3. Plato, b.c. 429–348.

The personal history of some of the greatest men is but little known. The great founder of the Academy, like Shakespeare and many others, lives for us in his works. Plato, the son of Ariston and Perictione, was born in Olympiad 87. 3., b.c. 429, being about the time of the death of Pericles. It is uncertain whether Athens or Ægina was his birth-place. By his mother's side he was descended from Codrus and Solon, and connected with the most distinguished families, the greatest politicians of the age. By nature gifted with the rarest talents, he received the best physical and mental education which Athens could afford; and in his youth was distinguished alike in music, poetry, and gymnastic exercises. By Socrates he was imbued with that spirit of true philosophy which pervades his works. Plato began to receive the instructions of Socrates when about twenty years of age, and listened to his discourses for eleven years. He had originally destined himself for public life; but the corruption of the fierce Athenian democracy drove the contemplative philosopher into the quiet groves of Academus. And thus in every line of Plato's dialogues we may discern a certain deficiency in practical contrivance—a thing only to be acquired in the working business of life, in the actual conduct of affairs.

After the persecution and death of Socrates—"that man, the best of all in his time that we have known, and moreover the most wise and just,"—Plato went to Megara, where he is said to have attended the lectures of Euclid. And, next, he spent several years in travelling, principally in Magna Græcia, Sicily, and Egypt. At Tarentum he is said to have been initiated by Archytas into the Pythagorean mysteries. And many have attributed to this the enlarged political and social views which he afterwards unfolded in the "Republic." Chiefly at the instance of the Pythagoreans, who desired to obtain a footing in Sicily, he made two voyages to that island, where, however, his attempts were wholly unsuccessful. After suffering some vicissitudes and nearly meeting death, through the agency of Dionysius, tyrant of Syracuse, he returned to Athens, and founded his celebrated school of the Academy. There he lectured during a period of nearly forty years, only broken, it is said, by two more journeys to Sicily. Among his disciples were Xenocrates, Aristotle, Demosthenes, and Theophrastus, worthy pupils of so great a master. Such, briefly, was his uneventful life. He died Olymp. 108, about B.C. 348.

The greatest advantage in studying the works of Plato arises from the peculiar cultivation of the philosopher. In Plato we are not perusing the doctrine of one individual however great; we have the whole Greek philosophy, illustrated alike by poets, historians, sages—and by Socrates and Plato applied to the knowledge and perfection of man. Nor has Plato absorbed only the Greek philosophy. In his youth he collected the rays of civilization dispersed through the schools of Megara, Cyrene, Italy, Egypt. Thus embracing all existing knowledge, he united the religious sentiment of Asia to the metaphysics and natural philosophy of Europe; and cultivated the beginnings of political science for the instruction of the human race. The impulse so given by Plato to human thought survives to the present time. "Here is the germ of that Europe we know so well, in

its long history of arts and arms; here are all its traits already discernible in the mind of Plato; and in none before him."[1]

Plato, in all his works, shows that one of the greatest causes of human corruption is bad education. He fully perceives that if knowledge be a power, ignorance is also a power—the power which keeps the savage a savage, and which commits each varied crime that disgrace civilization. His political discussions have for one of their immediate objects, the laying down of right principles of education, and enforcing them by the constitution of the laws and the power of the State. And his two great works, the "Republic" and the "Laws," may be considered as theories and plans of civic education rather than schemes of legislation and details of laws. The former inquires more particularly into the principles on which a right government may be formed; and the latter presents a systematic view of the principles of legislation; but comprising, as both works do, so much matter of a purely intellectual and ethical character, their primary object was the improvement of human nature by social institutions, expressly formed for the purpose.

Plato first divided philosophy into three parts—Dialectics, Physics, and Ethics, or the Political Science; and this division has been recognised by every succeeding age as a guide. Under Ethics he comprehended Politics, and generally the science of society. Dialectics, or Logic, was the science by which he traced the operations of the mind to certain fixed ideas inherent in the mind itself, though existing independently of it. He laid down the chief distinctions between each of these sciences, and traced their mutual dependencies. He also illustrated separately each branch of philosophy; but did not profess to give a complete system of each. In this respect his works are only suggestive of future discoveries. In his moral system he defined virtue to be the imitation of God, or the effort of man to attain to a resemblance

[1] Emerson.

of his original. Virtue is one, but compounded of four elements—wisdom, courage or constancy, temperance, and justice. Education is the liberal cultivation and moral discipline of the mind ; and the science of politics is the application to society of the moral law ; its ends are liberty and peace. Plato adopted the great Socratic principle—no one is willingly evil. He inferred from the idea of an all-perfect Deity that good is the general law, and that man is attracted to it by its nature. Evil is the result of ignorance ; ignorance enslaves man with a dark cave, from which the light of knowledge alone can free him. This, then, is the first great principle, that no one is willingly evil ; and the second is, that every one is capable of producing changes in his own moral character. The first has been thus exemplified by Ritter :—"As the rational soul can only involuntarily be subject to ignorance, it is only against its will that it can be evil. Every volition, by its essential nature, pursues the good ; no one is willing to be subject to evil, or to become bad, inasmuch as the end of volition is not the immediate act, but the object for the sake of which the act is undertaken ; and no man enters on any act or undertaking except for the sake of ultimate good. Now a man, when engaged in any act apparently good, may err, and choose the evil instead of the good ; but in that case he labours under an involuntary error, and does not what he really desires, but which, in spite of his wishes, seems to him either as an immediate good, or a means to an ultimate good."

When Plato wrote, the possibility of mental science was not suspected by the vulgar, and was denied by the learned. Even at the present day, how difficult it is to convince some that there are natural principles of justice, as there are natural principles of gravitation, and that it is equally possible, although incomparably more difficult, to ascertain them with accuracy. The ancient sophists maintained that right and wrong did not exist by nature, but only by convention. "That which appears just and honourable for each city is so for that

city, so long as the opinion is entertained," says Protagoras in the "Theætetes." The opinions of the sophists may have been exaggerated by their great opponent Plato; but still we may be assured that they did protest energetically against the possibility of mental science. And so, concerning Justice, Plato wrote: "Of all whose arguments are left to the men of the present time, no one has ever yet condemned injustice, or praised justice, otherwise than as respects the repute, honour, and emoluments arising therefrom; while as respects either of them in itself, and subsisting by its own power in the mind of the possessor, and concealed from both gods and men, no one has yet sufficiently investigated, either in poetry or prose writings—how, namely, that the one is the greatest of all the evils that the soul has within it, and Justice the greatest good."

But Plato's idea of the Just was so exalted, that the impossibility of its being enforced by human government has made the name of his "Republic" a symbol for a splendid political vision, whose airy outlines for ever mock the aspirations of the patriotic statesman.

On the subject of Justice, both in the individual and in the State, his views were these:—"In order that man may act rightly, there must be some end of his being, with the nature of which he ought carefully to acquaint himself. This is the real and true good, and a knowledge of it is indispensable to the moral man, and constitutes the virtue of wisdom."[1] It is therefore necessary to be instructed in this. Virtue, so far as it rests upon science, may be learned in the same sense as science itself is teachable; that is, originally and naturally, it dwells potentially in the soul, and may be drawn out by education. And in the consideration and practical application of this virtue the Socratic principle must never be forgotten—that no one is willingly evil.

In order, however, that this knowledge may result in action, the energy of the human soul must move. Human action requires means and co-operating causes:

[1] De Repub. b. viii. Charmides.

such is fortitude, the virtue of spirit, which is to support the reason. What Plato calls fortitude in a moral sense, does not consist merely in a contempt of death, or courage during danger, but solely in the maintenance of right opinions.

Temperance is the third virtue; and in the "Phædrus" he thus explains its essence:—Those are usually styled temperate who abstain from all excesses, and moderately indulge themselves, in order to avoid sickness, or pain, or deprivation of some other gratification, and in order to indulge their temperate indulgences as long as possible; and those are often called brave who fear not death, when they are in danger of losing other enjoyments. But the former are temperate from an intemperate desire of pleasure, the latter from the fear of losing either their honour or some other good possession. —Strange temperance that whose root is intemperance, and rare valour whose spring is cowardice! This, then, cannot be a true sacrifice to virtue which merely exchanges pleasure for pleasure, pain for pain, fear for fear, greater for less. The true coin is a right understanding of what is good.

And Justice, the fourth virtue, is employed by Plato to indicate a far higher idea than is now comprehended under the term. Justice represents the harmonious and proportional development of the inner man, by means of which each faculty of the soul, without interfering with the others, performs its due functions, and thereby produces within him complete and perfect order. It is the end and the unity by which the other three virtues co-exist and cohere; it is the harmony of wisdom, temperance, and courage. Its office is not to regulate the moral evolution of the several other virtues, but their mutual concord and adjustment.[1]

And all the moral virtues of the citizen are closely connected with those of the individual; for even though by the aid of philosophy, a man may have preserved himself pure from all unjust and unholy deeds, he is

[1] De Repub. b. 4, Ritter, b. viii. c. 5.

still far from having reached the highest degree of excellence, unless it should have been his happy lot to live in a well-ordered polity; for in such a state he will both himself attain to still greater perfection, and also be serviceable to his fellow citizens.

The Platonic idea of Justice in the individual embraces the harmonious exercise of the three principal virtues of the soul, knowledge, fortitude, and temperance,—and accordingly the whole range of our temporal duties. Whilst the Platonic idea of Justice in the State is that condition of life in which each individual in the community, without interfering with the natural rights of others, discharges in the best possible manner the duty for which he is best fitted. These ideas embrace almost the whole range of human action. And from this radical mistake that the State can control or direct all human actions, have sprung the errors of Plato. His schemes of politics as detailed in the "Republic" and "Laws," approve of the system of castes: whilst they attempt to control the minutest details of domestic life. Plato advocated the system of castes, because, although perceiving that the division of labour was necessary to the existence and progress of civilization, he did not at the same time perceive that it arose spontaneously and necessarily without legislative interference. In effect, the attempts of the legislature to enforce the division of labour have only the result of arresting its complete development.

Plato considered that all human duties came within the province and control of the public authority. Justice was the harmony of the virtues; and it was the business of the state to enforce justice. Modern jurists adopt a very different opinion. In England, Adam Smith was the first to point out with distinctness that justice did not embrace all virtues, but only includes the virtues and duties which are capable of being enforced by the public authority. But assuredly, in our present imperfect state of knowledge and development, we cannot say with certainty that a time may not come when, in ac-

cordance with the theory of Plato, all the virtues may be so enforced,—or at least their transgression with propriety punished by the State. The rights of which the State takes cognizance are increasing; and the circle of human duty capable of being enforced steadily expands with the progress of mankind. In the early ages, slaves had no rights. Now, in civilized states not only is slavery abolished, but poor laws provide for the subsistence and education of the indigent; and even the lower orders of animals are protected by law from the cruelty of their masters.

In ancient times, although the natural rights to life, liberty, and property were imperfectly acknowledged in practice, philosophers extended the range of the law to the entire scope of the moral virtues, and the whole domain of the affections. Modern legislation, for the most part, attempts but to protect natural rights; and gives to the individual unrestrained liberty, checked only by laws tending to promote the greatest welfare of the community. In the works of Aristotle we perceive an approach to the modern system. But in numerous instances he is entirely swayed by the political and social opinions of his great master, Plato.

4. Aristotle, B.C. 384-321.

Aristotle was born at Stagira, a city of the Thracian Chersonese, B.C. 384. In his seventeenth year he repaired to the school of Plato at Athens,—which rightly has been termed the then Great University of the world. There he remained twenty years; and his laborious devotion to science was appreciated by Plato, who termed him "The intellect of the School." At the death of Plato, Aristotle accompanied his fellow-pupil Xenocrates to the court of Hermias, tyrant of Atarneus in Mysia. Thence, on the overthrow of Hermias by the Persian king, he went to Mitylene. His great reputation was now shown by his appointment as tutor to the son of Philip of Macedon,—Alexander the Great, then fourteen

years of age. He continued with Alexander until he set out on his Asiatic campaign, B.C. 334. And although a personal coolness had arisen between them, still Alexander placed some thousands of persons under Aristotle's directions, to make inquiries on Natural History throughout Asia and Greece. The result was the History of Animals. Returned to Athens, he taught in the Lyceum: Xenocrates or Theophrastus then occupied the Academy; and the Cynics lectured in the Cynosarges. Whilst Aristotle delivered his discourses, he was in the habit of walking up and down,—a trait of character which forcibly illustrates the restless activity of his mind; and his school has hence obtained the name of Peripatetics. He lectured at the Lyceum for twelve years. Exposed at length to the same intolerant spirit which had put Socrates to death, he fled to Chalcis, saying, "that he was unwilling to involve the Athenians in another crime against philosophy." There he died, B.C. 321, in his sixty-third year.

Aristotle errs, like Plato, in blending together the objects of moral and political science. These ancient philosophers do not so much speculate on the best laws or the best form of government as about theories on the whole of human happiness. He appears to have adopted the term Politics as the designation of all ethical investigations. And Politics comprise all those disquisitions whose object is human good, as well in the individual, the family, and the state.[1] He therefore makes three principal divisions of politics,—Ethics, Economics, and Politics proper. The science of Ethics investigates the moral good of the individual; Economics treat of the right management of the family; Politics of the state.[2]

The fundamental principle of the Aristotelian Ethics is, that morality in the individual, or in society, is a something which grows out of natural endowments and destination. Nature has implanted in man an impulse to action and desire without which no act ever would be accomplished; so that all the moral acts of man must

[1] Eth. Nic. i. 1. Magn Mor. i. 1. Rhet. i. 2. [2] Pol. i. 3.

attach themselves to some natural disposition as its basis.[1] The investigations of Aristotle turn chiefly upon two principal notions, which the ethical system of Plato had largely developed—that of moral good, and that of virtue.

All men pursue some good; some things, however, are only good and desirable as means for the attainment of others; there must, therefore, be some ultimate good which is pursued solely for its own sake; the good absolutely, or the best; for otherwise, man's efforts would proceed without end, and his desire would be void and in vain.[2] In name, at least, all men are agreed as to this object of human pursuit, and call it Happiness.[3] Still the constituents of happiness are disputed. But it is only in the practical activity of the soul, which proceeds with reason, that the work and happiness of man consist. In order that happiness may be complete, it must exist in perfect activity, and in a perfect life. By perfect life Aristotle understood two things,—the development of life to the highest degree of perfection, and the consistency of the practical activity from its beginning to its close. And the saying of Solon is not without truth,—that we must wait till a man's death before we call him happy.

The following is a very brief Analysis of those portions of the Nicomachean Ethics which relate to Political Science.

Every art and every scientific system, and in like manner every course of action and deliberate preference, seems to aim at some good; and consequently "the good" has been well defined as "that which all things aim at."[4]

The good appears to be the end of that which is especially the chief science. And this is political science; for it directs what sciences states ought to cultivate, what individuals should learn, and how far they should pursue them.[5] Since, then, this science makes use of the practical sciences, and legislates respecting what ought to be

[1] Magn. Mor. ii. 4. [2] Eth. Nic. i. 1. [3] Eth. Nic. i. 2. Eth. Eud. i. 1.
[4] Book i. c. 1. s. 1. [5] B. i. c. 2. s. 3.

done, and what ought to be abstained from, its end must include those of the others; so that this end must be the good of man. For although the good of an individual and a state be the same, still that of a state appears more important and more perfect both to obtain and preserve. To discover the good of an individual is satisfactory, but to discover that of a state or nation is more noble and divine.[1]

In the third chapter Aristotle says, as was natural in his age, that perfect exactness is not to be expected in these ethical and political subjects. Things honourable and things just, the consideration of which falls within the province of political science, admit of such vast difference and uncertainty, that they seem to exist by law only, and not in the nature of things.[2] And this was the opinion of the sophists.

All men are agreed as to the name of the chief good; for both the vulgar and the educated call it Happiness; but concerning the nature of happiness they are at variance, some calling it health, some wealth. And conscious of their own ignorance, they admire those who say that it is something great and beyond them.[3] Some, again, have supposed that besides these numerous goods, there is another self-existent good, which is to all these the cause of their being goods.[4]

But happiness is neither sensual pleasure, nor honour, nor virtue, nor wealth.[5] It is desirable, then, that it should be explained what it is. Perhaps this may be done if we take the peculiar work of man; for as to the musician, and statuary, and every artist, and all who have any work or course of action, the good and excellence of each appears to consist in their peculiar work; so would it appear to be with man, if there is any peculiar work belonging to him.[6] What, then, must this peculiar work be? For man appears to share life in common with plants; but his peculiar work is the object of our inquiry. We must, therefore, separate the

[1] B. i. c. 2. ss. 4, 5, 6. [2] B. i. c. 3. s 2. [3] B. i. c. 5. ss. 2, 3.
[4] B. i. c. 5. s. 4. [5] B. i. c. 5. [6] B. i. c. 7. s. 8.

life of nutrition and growth. Then a kind of sensitive life would next follow; but this also he appears to enjoy in common with the horse, the ox, and every animal.[1] There remains, therefore, a certain practical life of a being which possesses reason; and of this one part is, as it were, obedient to reason, the other as possessing it, and exercising intellect. But this life being also spoken of in two ways—according to energy and according to habit—we must take that according to energy.[2] Now if we assume the peculiar work of man to be a kind of life, and this life an energy of the soul, and actions performed with reason and the peculiar work of a good man to be the same things done well and honourably, and every thing to be complete according to its proper excellence—if these things be true, it follows that man's chief good is an energy of the soul according to virtue; but if the virtues are more than one, according to the best and most perfect virtue; and besides this we must add in a perfect life: for as neither one swallow nor one day makes a spring; so neither does one day, nor a short time, make a man blessed and happy.[3]

The second, third, and fourth books are occupied with a discussion upon virtue in general. The fifth book discusses Justice and Injustice; and is almost identically the same with the fourth book of the Eudemean Ethics.

All men mean by the term Justice that kind of habit from which men are apt to perform just actions, and from which they act justly and wish for just things; and similarly in the case of Injustice, that habit from which they act unjustly, and wish for unjust things.[4] Justice and Injustice are used in more senses than one. The transgressor of law appears to be unjust, and the man who takes more than his share, and the unfair man; so that it is clear that the just man also will mean the man who acts according to law, and the fair man. The Just is therefore the Lawful and Fair; the Unjust the Unlawful and Unfair.[5]

[1] B. i. c. 7. s. 10. [2] Ib. s. 11. [3] Ib. s. 19. [4] B. v. c. 1. s. 2. [5] Ss. 1, 6, 7.

But since the transgressor of law is unjust, and the keeper of law just, it is clear that all lawful things are in some sense just; for those things which have been defined by the legislative science are lawful.[1] But laws make mention of all subjects with a view either to the common advantage of all, or of men in power, or of the best citizens, according to virtue, or some other such standard. So that, in one way, we call those things just which are adapted to produce and preserve happiness and its parts for the social community.[2] This justice, therefore, is perfect virtue, not absolutely, but relatively; and for this reason, justice often appears to be the most excellent of the virtues; and neither the evening nor the morning star is so admirable; and in a proverb we say, "in justice all virtue is comprehended;" and it is more than any other perfect virtue, because it is the exercise of perfect virtue; and it is perfect, because the possessor of it is able to exercise his virtue towards another person, and not only in reference to himself; for many men are able to exercise virtue in their own concerns, but not in matters which concern other people.[3] For this reason, the saying of Bias seems to be a good one, "Power will show the man;" for the man in power is at once associated with, and stands in relation to, others; and for this reason justice alone, of all the virtues, seems to be a good to another person, because it has relation to another; for it does what is advantageous to some one else, either to the head, or to some member of the Commonwealth. That man, therefore, is the worst who acts viciously, both as regards himself and his friends, and that man is the best who acts virtuously, not as regards himself, but as regards another; for this is a difficult task.[4]

Universal justice being perfect virtue, considered not absolutely, but relatively, there is also a particular justice which is violated when the law is broken for the sake of gain. Particular justice is divided into two species; one distributive, being concerned in the distri-

[1] S. 9. [2] S. 10. [3] S. 12. [4] S. 13.

butions of honour, or of wealth, or of any of those other things which can possibly be distributed among the members of a political community; the other, corrective in transactions between man and man.[1]

Distributive justice regards the relative deserts of persons, and the respective values of things: and in it geometrical proportion is observed;[2] for in geometrical proportion it comes to pass that the whole has the same ratio to the whole which each part has to the other.[3]

But corrective justice deals not according to geometrical but arithmetical proportion. For it matters not whether a good man has robbed a bad man, or a bad man a good one, nor whether a good or a bad man has committed adultery; the law looks to the difference of the hurt alone, and treats the persons, if one commits and the other suffers injury, as equal, and also if one has done and the other suffered hurt.[4]

The equal is the mean between the more and the less. But gain and loss are one more and the other less in contrary ways; that is, the more of good and the less of evil is a gain and the contrary is a loss. Between which the mean is the equal, which we call the just, so that the just, which is corrective, must be between loss and gain. Hence it is that when they have a quarrel they go to the judge; but going to the judge is going to the just; for the meaning of the word judge is a living personification of the just; and they seek a judge as a mean.[5] But the judge equalizes, and, just as if a line had been cut into two unequal parts, he takes away from the greater part that quantity by which it exceeds the real half, and adds it to the lesser part; but when the whole is divided into two equal parts, then they say that the parties have their own when they have got an equal share. But the equal is the mean between greater and

[1] B. v. c. 2. s. 8.

[2] B. v. c. 3. s. 6.

[3]
$$A : B :: C : D$$
Alternando $A : C :: B : D$
Componendo $A+C : B+D :: A : B$
Alternando $A+C : A :: B+D : B$

[4] B. v. c. 4. ss. 1, 2.

[5] Ss. 4, 5.

less, according to arithmetical proportion. For this reason also, the just is called δίκαιον, because it is δίχα (in two parts), just as if a person should call it δίχαιον (divided in two), and the δικαστὴς is so called, being as it were διχαστής (a divider[1]).

In another place Justice is accordingly defined as a medium between excess and defect, Ἡ δικαιοσύνη μεσότης τίς ἂν εἴη ὑπερβόλης καὶ ἐλλειψέως.[2]

It is probable that Philology will show that a division into equal parts is the original idea of Justice in all nations and languages. Thus in Arabic *Insax*,—Justice,—literally means dividing in half: in Latin *Æquitas* means equality of division.

Commutative Justice, the Law of Retaliation,—*lex talionis*,—was the Pythagorean idea of absolute justice; but Aristotle shows its erroneousness. For a blow given by a person of rank and by an humble person is not justly punished by being simply returned. And again, the voluntariness or involuntariness of actions makes a great difference. But in the intercourse of exchange such a notion of justice as retaliation, if it be according to proportion and not according to equality, holds men together. For by proportionate retaliation civil society is held together. For men either seek to retaliate evil —otherwise if a man must not retaliate, his condition appears to be as bad as slavery; or to retaliate good—otherwise there is no interchange of good offices; and by these society is held together.[3]

Political Justice takes place in the case of those who live as members of society with a view to self-sufficiency, and who are free and equal either proportionately or numerically. So that all those who are not in this condition have not the political just in relation to one another, but only a kind of justice, so called from its resemblance.[4] Of the political just, one part is natural and the other legal. The natural is that which everywhere is equally valid, and depends not upon being or

[1] Ss. 6, 7.
[2] Mag. Mor. l. 1. c. 34.
[3] B. v. c. 5. ss. 1, 2.
[4] B. v. c. vi. ss. 14.

not being received. But the legal is that which originally was a matter of indifference, but which when enacted is so no longer; as the price of a ransom being fixed, and all particular acts of legislation.[1]

After considering the divisions of offences he investigates Equity (ἐπιείκια).[2] Equity and justice do not seem to be absolutely the same, nor yet generally different. And we sometimes praise the equitable and the men of that character; so that we even transfer the expression for the purpose of praise to other cases, showing by the use of the term equitable instead of good, that equity is better. Sometimes again, if we attend to the definition, it appears absurd that equity should be praiseworthy when it is something different from justice, for either justice must be not good, or equity must be not just—that is, if it be different from justice, or if they are both good, they must both be the same. The cause of the ambiguity is this, that the equitable is just, but not that justice which is according to law, but the correction of the legally just. And the reason of this is that law is in all cases universal, and on some subjects it is not possible to speak universally with correctness. When therefore the law speaks universally, and something happens different from the generality of cases, then it is proper that where the legislator has erred from speaking generally to correct the defect, as the legislator would himself direct if he were then present, or as he would have legislated if he had been aware of the case; therefore the equitable is just, and better than some kind of the just; not indeed better than the absolute just, but better than the error which arises from universal enactments. This therefore is the definition of Equity—ἐπιείκια—that it is a correction of law wherever it is defective owing to its universality. And it is also clear what the character of the equitable man is. For he who does such things from deliberate preference,—who does not push the letter of the law to the furthest on the worst side (which is expressed in our proverb *sum-*

[1] B. v. c. vii. s. 1. [2] B. v. c. x.

mum jus, *summa injuria*), but is disposed to make allowances, even although he has the law in his favour,—is equitable.

Two fundamental errors, the absolutism of the state and slavery, common to Plato and Aristotle, corrupted to the source their theory of Politics. They took for absolute truth the passing errors of an incomplete society, and did not comprehend the new signs which manifested themselves in the doctrines of Socrates, and the development of society.

There remained, therefore, two truths to introduce into the Political Philosophy of the ancients; first, to teach man that he is something dehors the state; secondly, to generalize the title of man, and to extend the friendship and sympathy which Plato and Aristotle had supposed only to exist amongst the privileged classes. This was the business of the Stoic philosophy.[1]

The Cynical school had already burst the ties which chained man to the state. The Cynics and their success were plainly a protest of the popular classes against the aristocratic philosophy of Plato and the other Socratics. But the Cynic Philosophy was rather an enemy of the laws and society than a friend of humanity. Diogenes said he was a citizen of the world; that the only government worthy of our admiration was the government of the universe. But these fine words only concealed a gross egotism. The Cynic was an enemy of the ties of country, family, and property. He placed virtue only in the strength to endure privations, and in the independence of all social laws. He had no principle of fraternity or sociality. Nevertheless the Cynic philosophy, in attacking social distinctions maintained by the laws, and in displaying mendicants and slaves as philosophers, served in a manner to change the ancient ideas and to prepare the way for Stoicism.

It was not until near a century after the death of Plato, that Ethics became the scene of philosophical contest between the adverse schools of Epicurus and Zeno;

[1] Janet, Phil. Mor. et Pol. Liv. i. chap. 4.

whose errors afford an instructive example that, in the formation of theory, partial truth is equivalent to absolute falsehood. As the astronomer who left either the centrifugal or the centripetal force of the planets out of his view, would err as completely as he who excluded both, so the Epicureans and Stoics who each confined themselves to real but partial and one-sided principles in morals, departed as widely from the truth as if they had adopted no portion of it. The two sects respectively sought a single solution for a complex problem, from not comprehending the two principles capable of solving it. The Epicureans placed the sovereign good in happiness alone; the Stoics, in the consciousness of virtue. The former identified prudence and morality—a very common error. They represented the tendency to produce happiness as the sole inducement to virtuous practice—a truth of great importance to the completeness of ethical theory. The Stoics were disposed to regard the moral sentiments, which are the motives of right conduct, as being the sole principles of moral science. The high-souled but impracticable morality of the Stoics, for the sake of vindicating Providence, declared pain to be no evil, and placed the wise man wholly out of the power of fortune. The poor and sordid philosophy of the disciples of Epicurus easily dropped by degrees the limitations by which he guarded his doctrines, and made indolent pleasure the object for which man lived, and the various affections of his chequered nature so many disguises of self-love. The true solution of this disputed problem might perhaps be found in the connexion and harmony of Virtue and Happiness as merited by Virtue. The two principles are not equivalent. Virtue is the antecedent. It is not alone the sovereign good; but it is the chief good. The eminently practical, and exquisitely balanced mind of Aristotle had not been betrayed into either of the extremes just considered. While steadily pronouncing Virtue a good in itself, he never fell into the extravagance of holding it to be man's only good. The highest good of man he regarded as consisting in the full exer-

cise of all the faculties of mind and body in their complete perfection; and in this view he recognised the outward advantages of fortune and the enjoyment of that health which it is not always in our power to procure or preserve, as integral parts of that good which is the τέλος τελεῖον. for which man lives. In fact, the doctrine of the Peripatetics on this subject appears to have coincided with that of the Pythagorean school, who defined Happiness to be the Exercise of Virtue in a prosperous life—χρῆσις ἀρετῆς ἐν ἐυτυχία.

It will hereafter be seen that the two opposite moral schools of antiquity, the Stoical and the Epicurean, have had their antagonism prolonged into modern times; nor can it cease to subsist so long as there is a school of Independent Morality which, like Butler, seeks the ground of virtue or moral rightness in the faculties of man, and their relation to each other—which would regulate human action by an internal principle, as Conscience, or a Moral Faculty, or Duty, or Rectitude, or the superiority of Reason to Desire; and another school of Dependent Morality which, like Paley, looks for the criterion of rightness to external things, and asserts Pleasure, or Utility, or the Greatest Happiness of the Greatest Number, to be the true end of human action.

Sir James Mackintosh has instituted an ingenious comparative estimate of the several philosophical systems of antiquity by tracing the operation of their principles upon the lives and conduct of their most illustrious professors in the ranks of the Roman Patriciate—a case which seems to comply with all the conditions of a strict scientific experiment. The influence of the Grecian systems was tried by their effect on a body of men of the utmost originality, energy, and variety of character, during the five centuries between Carneades and Constantine, in their successive positions of rulers of the world, and of slaves, under the best and under the worst of uncontrolled masters. "The result is the more satisfactory, because it appears to illustrate general tendency without excluding very remarkable exceptions.

Though Cassius was an Epicurean, the true representative of that school was the accomplished, prudent, friendly, good-natured time-server, Atticus, the pliant slave of every tyrant, who could kiss the hand of Antony, imbrued as it was in the blood of Cicero. The pure school of Plato sent forth Marcus Brutus, the signal humanity of whose life was both necessary and sufficient to prove that his daring breach of venerable rules flowed only from that dire necessity which left no other means of upholding the most sacred principles. The Roman orator, though in speculative questions he embraced that mitigated doubt which allowed most ease and freedom to his genius, yet in those moral writings where his heart was most deeply interested, followed the severest sect of philosophy, and became almost a Stoic. If any conclusion may be hazarded from this trial of systems, the greatest which history has recorded, we must not refuse our decided, though not undistinguishing, preference to that noble school which preserved great souls untainted at the court of dissolute and ferocious tyrants; which exalted the slave of one of Nero's courtiers to be a moral teacher of aftertimes; which, for the first, and hitherto for the only time, breathed philosophy and justice into those rules of law which govern the ordinary concerns of every man; and which, above all, has constituted, by the examples of Marcus Porcius Cato, and of Marcus Aurelius Antoninus, to raise the dignity of our species, to keep alive a more ardent love of virtue, and a more awful sense of duty, throughout all generations."

The political life of Greece being the main pillar of its speculative life, we would naturally anticipate that where that political life was departed, its speculations would become withered and heartless. And so it was. The genius of Greece fell with liberty. The Grecian philosophy received its mortal wound in the contests between scepticism and dogmatism, which occupied the schools in the age of Cicero. Energetic and original thought had expired. To that restless speculative spirit which, commencing with Thales, had informed and illustrated every

phase of Grecian social existence, nothing was left but to invent a few new combinations, and re-cast certain forms of thought and language out of which the meaning had departed—to rehabilitate itself in that worn-out and cast-off skin from which the living serpent had gone forth to other lands. Philosophy, exiled from Greece, found a shelter in Rome.

CHAPTER II.

THE ROMAN LAW AND JURISPRUDENCE.

AUTHORITIES:—Günther; Historia Juris Romani; Niebuhr's Roman History; Arnold's Roman History; Savigny; System des heutigen Römischen Rechts—Berlin, 1840, 8 vols., 8vo—translated into French by Guenoux—Paris, Didot, 1840; Burchardt; Staats und Rechts-Geschicte der Römer—Stuttgardt, 1841; Hugo; Lehrbuch des heutigen Römischen Rechts, 1826; Thibaut; System des Pandekten-rechts, 1834.

1. The early Roman Law is a type of the blending of the popular and technical elements which exist in all laws. The whole Roman Law originally existed only by custom. Custom is converted into law when it begins to be associated with the idea of Right, when the neglect to observe the custom disappoints the general expectation, and when the state employs force to punish the violation of the custom. All Law is originally customary Law. And the legal force of custom is derived from the common consciousness of the people that they expect the things to be done which ought to be done, and are usually done by those amongst the community who strive to do Right. The early Roman Law is characterized by that religious solemnity which is found in the legislations of the most ancient as well as the most recent states. Ceremonies are found invariably in early laws; they are all originally symbolical, but of many in time the meaning is forgotten. Symbolical forms which at first have a deep religious meaning, are finally used only to excite attention and impress the memory. The necessity which Lawyers feel for the fixing of the memory, when in the progress of time they disregard the religious

element in Law, leads to the introduction of the technical system. In Rome there gradually arose a technical branch of Law regulating all legal procedure; hence sprung the class of technical Lawyers; hence arose the demand for legal reform and the first Codification of the Roman Law. The first Government of Rome was composed of an elective King, a Council of nobles, and a General Assembly of the people. We have few records of the laws of the Kings, nor is it of any advantage to waste learning upon the fragments of those Laws which have been compiled by the diligence of antiquarians. I shall not enter into the question whether the legendary history of the Roman Kings contained the record of the origin of a nation or of a change of Government, by which an ancient civilized race aided in the formation of the Roman people. According to the history which we have, the prevalence of insolvency and the severity of the laws of debt created great discontent amongst the Plebeians, and they conspired against the Patricians for relief against oppression. The general discontent finally led to a proposal for a revision of the Laws. And Livy and the other Roman historians tell the mythical story that a Commission of three persons was appointed to visit Athens and other Greek cities, and to transcribe the laws of Solon. The three envoys returned in the year after their appointment. The plan of reforming the government and legislation of Rome commenced. All the great offices of state were abrogated for a year, and the entire government, legislative, administrative, and judicial, was vested in a Council of ten to prepare a Code. Before the end of the year the Decemvirs compiled a Code from the written Greek laws and the Roman unwritten customs. They inscribed these Laws on ten tables, which were exhibited in public, and revised by the sages of the city. These laws were then sanctioned by the Senate and the vote of the people in their Assembly. We have few authentic records as to the manner in which the government of the Decemvirs in the first year became tyranny in the second year. The

story of Virginia is familiar to the world. Cicero makes a broad distinction between the ten tables of the first Decemvirs and the two tables of the second Decemvirs. He says the laws of the latter were unjust; and he mentions as a novel hardship the prohibition of intermarriage between the Patricians and the Plebeians. However, the Laws of the Twelve Tables were always considered as the foundation of legal right, and they were all mentioned with equal reverence down to the latest period of Roman history. They were regarded equally by Livy and by Cicero as the fountain of all public and private right.

Some of the provisions of the Twelve Tables which were intended to protect the person and the property of private citizens are important to consider. It was enacted that any person claimed as a slave should be left at freedom until the alleged master proved his claim good. This was the Law violated by Appius in the case of Virginia. The power of a father over his children was made less absolute. By the old law the son was a slave to his father. From the time of the Twelve Tables the son might acquire independence by means of three sales, whether real or fictitious. The Twelve Tables left the law of debt in its former state of severity. But usury laws were enacted, which attempted, although erroneously, to make it possible to borrow money at a lower rate than the market price. It was made illegal to exact higher interest than ten per cent. By the Twelve Tables no private Law to impose any penalty or disability on a single citizen was possible to be enacted; there was to be an appeal to the people from the sentence of every magistrate; and no citizen was to be tried for his life except before the great Roman Assembly, the Comitia of the Centuries. These laws were repeatedly renewed, and were finally consolidated more than two centuries later by the famous Porcian laws, by which it was enacted that no Roman citizen should be put to death or scourged without trial before the Centuries. These laws may be compared to the English Acts of Habeas Corpus. Under the English law no man can be imprisoned by the

sovereign or his officers without having his person produced in open court and allowed a fair trial. However, as in England, in times of rebellion, the Habeas Corpus Act is suspended, so in Rome the laws of appeal were occasionally suspended. This was done in the earlier times by the appointment of a Dictator, and afterwards by a resolution of the Senate, that the Consul should take heed that the Republic suffered no injury. Under this resolution the Consuls were invested with the supreme dictatorial power.

On the whole, the Legislation of the first Ten Tables was fair; and it really tended to introduce equal rights both in Law and Government for the entire nation. But some laws had a directly contrary effect. These have been attributed to the two last tables of the Code. The old law prohibiting intermarriage between the two orders of Patricians and Plebeians was now formally re-enacted, and thus the aim of the promoters of the Decemviral Code was defeated so far as they sought to procure an equalization of the two orders. Such an equalization was impossible so long as the National Code of Law proclaimed the two orders of Patricians and Plebeians to be of different races, unfit to mingle with one another. The license of public libel was restrained by the law of the Twelve Tables, which subjected libellers to the deprivation of civil rights. But though the Twelve Tables enacted many useful reforms, they left one matter untouched. No attempt was made to distribute the public land more justly. Hence the introduction of agrarian laws remained as a constant source of the most violent civil commotions.

From a motive of national pride the Roman historians wished to believe that before the Twelve Tables were enacted the Roman deputies visited Athens, and consulted the Grecian laws. However, all the Grecian memorials and history are silent on the subject, and there is no authentic record that the embassy ever took place. In any comparison of the Twelve Tables no more resemblance is found to the Grecian laws than may be found

to all laws of civilized nations in the same phase of legal existence. Whatever was the origin of the Twelve Tables, so long as Roman law prevailed, they obtained amongst the Roman lawyers a blind and partial reverence; they were committed to the memory of students, they were illustrated by the labours of the learned, they had escaped the conflagration of the city by the Gauls, they subsisted to the time of Justinian, and their subsequent loss has not been restored. Subsequently the acts and new laws before the time of the consolidation under Justinian exceeded three thousand in number, and many of the acts contained over one hundred chapters.

The Decemvirs had been elected and the Twelve Tables were sanctioned by the Assembly of the Centuries, in which riches preponderated against numbers. Ninety-eight votes were assigned to the first class of Romans—the proprietors of one hundred thousand pounds of copper, equal to five thousand pounds sterling of English money, and only ninety-five more votes were left for the six inferior classes. However by degrees the Assembly of the Centuries was superseded by the Assembly of the Tribes, in which the vote of each Roman citizen, poor or rich, was of equal value. Originally the votes were given in public; but "a method of secret ballot abolished the influence of fear and shame, of honour and interest, and the abuse of freedom accelerated the progress of anarchy and despotism."

2. The law of real property in Rome was in a state of more advanced development than under the feudal system. At Rome property was derived from political rights rather than political rights from property. In this the ancient system of privileged castes still prevailed. But contrary to the feudal method, the proprietor of land was the absolute owner of it in his lifetime; and could bestow it absolutely on his death. The rights and duties of a Roman citizen were derived not from his possession of property, but from his being a member of the society to whose law he owed his property. A vast proportion of the Roman territory was land acquired by the

sword. In ancient times when a state was conquered, the private rights of its inhabitants to their landed property were commonly disregarded. And this land so conquered in war constituted the ager publicus of the Roman people. But in the progress of society there is an inevitable tendency to the individual appropriation of common or public land. This is natural, necessary, and ultimately beneficial. Land so held in common, loses a great portion of its value to the copartners, and occasions perpetual disputation. Cultivation cannot proceed ; nor will expensive buildings be erected where the proprietor is a mere usufructuary, and the property is not absolute in him. The powerful patrician families obtained large grants of the public land, and endeavoured to make their property in them absolute in themselves, or hereditary in their families. The plebeians as constantly strove to keep the land public, in the hopes of sometimes obtaining a share of the spoil. The occupation of such public land could be transmitted from father to son as an inheritance, and could be sold. But the occupant remained in law a precarious tenant whom the State had a right to dispossess when occasion required. The Licinian Law, B.C. 366, provided that no one should possess more than five hundred jugera of this public land. Although numerous divisions of the land had taken place in small portions among the victorious soldiers of Rome, still there was a constant tendency to the accumulation of landed property in the hands of the nobles. The ravages of war in Italy continually annihilated the small farms. And slavery rendered the cultivation of immense tracts of land easy and profitable. Thus when Tiberius Sempronius Gracchus, on his march to Spain, passed through Etruria, he saw far and wide no free labourers, but numbers of slaves in chains ; whilst the population of Rome was becoming more and more pauperised.

The remedy proposed by the elder Gracchus for these things was in the social state which characterized that period of history impracticable. This public land had

been in the possession of families for one hundred, and in some cases for two hundred years. Where the lands had not been in the possession of the same family, others had bonâ fide purchased them. When some of the lands had been ravaged by war, and their possessors slain, the neighbouring proprietors had occupied them, and changed them by expenditure of their capital and labour into olive-fields and plantations. Others, on the faith of long-continued possession, had built on the lands. Thus divers equities had arisen difficult to be encountered by those who sought a re-division of the public land.

Tiberius Gracchus, B.C. 132, carried a law, constituting three commissioners to inquire into the administration of the public lands and the violations of the Licinian Law. His plan was, that no one should occupy more than 500 jugera of the public land for himself, and 250 for each of his sons—"ne quis plus mille agri jugera haberet." He further wished to enact that the lands thus recovered by the State should not be allowed to be sold; and this clause he desired to introduce in order to prevent the wealthy Romans from acquiring them. It is plain that this enactment would have been wholly nugatory. Where two free agents wish to effect a transfer of property, it is almost impossible for a law to prevent them. Again, buildings erected on lands according to this law to be taken from their possessors, were to be valued, and the price to be given in money to the owners of the buildings. But persons who had bonâ fide purchased from the occupants their interest in the public lands, grounded on their long possession, would have lost their money. This agrarian scheme of confiscation, combined with the political reforms meditated by Gracchus, called forth the bitter exasperation which ended in his murder.

Notwithstanding the great authority of Niebuhr, the agrarian bill of Tiberius Gracchus must be considered an interference with the rights of private property. In name the domain land was public, and the State had a right to resume it. But labour had certainly conferred rights of property upon the persons who had been for so

many years permitted to occupy the land; and purchasers for value unquestionably had preferable rights to the needy populace of Rome. Even if Gracchus had proposed to estimate fairly all the improvements, and to pay the full value to the occupants of the land, it seems uncertain whether it would not have been preferable to divide the money raised for such a purpose amongst the plebeians, than first to dispossess the occupants of the public land, then to compensate them for their loss, and, after all the confusion and distress unavoidable from such a scheme, finally to divide the land amongst the plebeian populace of Rome, poor, unused to agriculture, and without the means to stock their farms.

The value of houses and all other buildings on agricultural estates is most imperfectly transferable. In recent experience in Ireland mansions built at an expense of £20,000 and £30,000, and which, to the families of their owners, had a far higher value, have not produced, at a sale by auction in the Incumbered Estates Court, under the most favourable circumstances, one-third of their original cost. Therefore it is to be considered that the plan of Gracchus, if completed, would have destroyed so much of the value of the agricultural property which it proposed thus compulsorily to transfer. It is to be regretted, that instead of devoting his splendid talents to the scheme of forcibly substituting a system of small farming for the system of large estates cultivated by slaves, he did not at once apply his energy to the abolition of slavery.

The great reforms effected by the Twelve Tables were the establishment of the legal equality of all Roman citizens, and the enactment that there should be an appeal to the people from the sentence of every magistrate, and that all capital trials should be conducted before the Comitia of the Centuries. However, the aristocracy still preserved the exclusive eligibility to the consulship. And the caste system was still maintained in the prohibition of intermarriages between the patricians and plebeians. Thus the fusion of Patricians and Plebeians into one united people remained incomplete.

From the recognition of the equality of all citizens by the twelve tables, the plebeians rapidly progressed in the development of their civil rights. The Consul Valerius, B.C. 446, passed a law giving legislative force to the plebiscita, the votes of the Commons in the Comitia Tributa,—"ut quod tributim plebes jussisset, populum teneret." The Tribune Canuleius, B.C. 445, repealed the marriage-law in the last of the twelve tables. The office of the quæstors or secretaries of the Public Treasury was thrown open to the plebeians, B.C. 418. The Licinian Law, through the influence of the great Camillus, opened the consulship to the plebeians, B.C. 366. And the plebeians were admitted to the Dictatorship, B.C. 353—to the Censorship, B.C. 334. The Ogulnian Law, B.C. 300, threw open the priesthood to the Commons; and thereby finally abolished the distinctness of the patrician caste.

3. CICERO, B.C. 107–44.

AUTHORITIES:—Plutarch, Life of Cicero; Morabin, History of Cicero, Paris, 1745, 2 vols. 4to.; Middleton, Life of Cicero; Hulseman: De Indole Philosophicâ M. T. Ciceronis, Luneb. 1799, 4to; Dunlop's History of Roman Literature, London, 1824; Ritter's History of Ancient Philosophy, book iii. cap. ii.

The Romans were essentially a nation of warriors. Of themselves they acquired no speculative philosophy, and for six centuries were ignorant of the very name. They were strangers to the various systems of legislation, to those rhetorical treatises on jurisprudence, whether composed upon aristocratic or democratic principles, which the Greeks possessed in abundance. But in their laws, and especially in their ancient political system, they displayed a practical sense, almost an instinct in legislation. Thus the tribunate introduced that element of constitutional opposition which has been developed with such success in England in the system of government by parties. However, with wealth and conquest appeared Philosophy. In the year of the city 586, when Perseus of Macedon was finally conquered, the

philosopher Metrodorus followed in the train of the victorious army to Rome. Other Greeks soon accompanied him, and were favoured by the most enlightened Romans—Lælius, Scipio, and Scævola. Still the unlettered senate regarded the new philosophy with distrust, and, U.C. 592, publicly banished it from Rome. But philosophy soon returned in a more honourable guise. Athens sent an embassy to Rome U.C. 598, and selected for the purpose her then most distinguished sages, The envoys were—Diogenes, then the head of the Stoics; Critolaus, the head of the Peripatetics; and Carneades, the Cyrenæic, the head of the New Academics. During their embassy they gave public lectures, attended by crowds of the youthful patricians. Diogenes in particular was supported by the jurisconsults, who from that time cultivated the trenchant logic of the Stoic philosophy, and introduced many of its principles into the Civil Law. But before Cicero no Latin writer on the principles of Law and Politics had appeared in Rome, so that the entire of this noble domain of literature was open for one worthy of it.

This great man was born in an age which the universal testimony of mankind has called one of the most illustrious in the world. Rome culminated in the height of her power, and from the freedom of her institutions there was the noblest career for talents which any state had ever yet presented in the history of mankind. Cicero was not compelled to struggle with the same difficulties as Demosthenes. Humble birth or ruined fortunes did not obstruct him in the pursuit of fame; and the provident care of a father gave him that best of gifts, a good education. It is, however, a question whether in the grand pursuits of ambition some difficulty at the outstep of life be not an advantage to genius, as it is an incentive to industry. Before Cicero were the seductions of that city where the most extravagant wealth urged the keenest intellects to ransack the world for new inventions of luxury. But he applied his wealth to wealth's noblest task, the cultivation of the intellect.

When Rome had given him all that could be taught by her poets and orators, he went to Athens and the cities of the Lesser Asia; and they too unfolded to him all the treasures of their wisdom, all that art could teach or inspiration bestow. He spent long years in the study of eloquence, in the endeavour to acquire a correct fluency of style. For, Cicero, whose works are so voluminous, whose style is so beautiful, himself tells us that at the commencement of his career he was unable to speak or write correctly the Latin language.

All that illustrates the career of the great men of antiquity is amongst the most useful lessons left to us by the olden times:—

"Lives of great men all remind us,
We can make our lives sublime,
And departing leave behind us
Footsteps on the sand of time;
Footprints that, perhaps, another,
Sailing o'er life's solemn main,
A forlorn and shipwrecked brother,
Seeing shall take heart again."
—LONGFELLOW.

There exists for us little real of the old world except those collossal intellects which still rise above the waters of oblivion. Classical Rome, the one sole object of all Cicero's hopes, and fears, and wishes, is no more! The pinnacles of the Capitol, gilded with barbaric gold and seen afar as a crown, have fallen. The poet grandly prophesied that the sacrifice wherein the priest with the silent virgin ascended the Capitol should not be discontinued for all eternity,—the very rites have faded from human memory in a little space of time. The grass grows in the deserted forum, and the peasant's plough turns up the fragment of a column,—memorial of those eternal structures where Roman citizens sate in judgment upon kings. Capitol and temple, forum and shrine, empire and religion, are gone, but the words of Cicero have survived the fragile objects that inspired them.

But we cannot here dwell upon the details of Cicero's history; nor upon the orations that entranced the ancient world, and have been the delight and instruc-

tion of every succeeding age; nor upon the miserable end of his arduous life. The great Roman orator, though more successful in public affairs than Demosthenes, like him found a grave beneath the ruins of his country's liberty:—

> "Eloquio sed uterque perit orator; utrumque
> Largus et exundans letho dedit ingenii fons."[1]

Reflecting on the wretched deaths of the greatest men in the ancient world, modern statesmen may congratulate themselves on living in an age and country where a change of ministry does not involve confiscation, exile, and death to the defeated party. Late in life, when the combinations of his enemies had succeeded in driving him from the public stage of politics, he applied himself again to philosophy, and laboured to transplant into Italy the most perfect theories of the Grecian schools. Like Socrates and Plato, Cicero raised himself beyond the details of local politics, and extended his philanthropy to mankind. Amongst human virtues, he writes, nothing is more beautiful than the union between men, this association, this community of interest, this love of the human race,—caritas humani generis—which, commencing with the family, spreads itself progressively over parents, friends, neighbours, fellow-citizens, and thus finally over the human race.

Cicero combined in himself the characters of the learned lawyer, the enlightened statesman, and the profound philosopher. He lived and took a leading part in one of the most eventful and splendid periods in history. His friends and enemies were the captains and statesmen of the age. There is, therefore, in his political philosophy a practical turn which renders it more useful than the poetical aspirations of Plato, or the hard abstractions of Aristotle. With Cicero, eloquence was an aid to worldly honour, political philosophy a guide to actual legislation.

The celebrated treatise De Republicâ was rescued from oblivion by the learned Cardinal Maio, when li-

[1] Juvenal, Sat. x. 118.

brarian of the Vatican. He discovered the work in a palimpsest volume containing a part of Augustin's Commentaries on the Psalms, and published the greater portion of it at Rome in 1822. In the De Republicâ, Cicero shows first that the study of philosophic truth should be made as practicable as possible, and applied to the interests of philanthropy and patriotism. It is not sufficient to possess virtue as an art except we use it.[1] An art, indeed, though we may not use it, may still be possessed in knowledge; but virtue absolutely consists in its use, and its noblest use is the government of the Commonwealth. For nothing is said by philosophers, so far as it is said rightly and honestly, which has not been discovered and confirmed by those who have given laws to States. For whence is piety?—from what sources religion?—whence the Law of Nations, or that which is termed the Civil Law?—whence justice, faith, equity?—whence modesty, continence, the horror of baseness, the emulation of praise and honour?—doubtless from those who instilled some of these principles by education, confirmed others by manners, and sanctioned others by laws.[2] Xenocrates when asked what his disciples learned from him replied, "to do spontaneously what they might be compelled to do by the laws." Therefore that citizen, who by the authority and sanction of laws obliges all to do that to which the philosophers by their eloquence could scarcely persuade a few, is to be esteemed before such doctors. For what speech of theirs is so exquisite as to be preferred before a well-constituted state, public justice, and good manners?[3] In these books Cicero undertakes a discussion on the State, and first argues against the hesitation of philosophers to enter into public affairs.[4] If there be any who are moved by such authority, let them attend to those whose authority and glory are greatest amongst the most learned men; whom I consider, even though themselves have not conducted the Government, still, since they have in-

[1] De Republicâ, Ciceronis Opera, vol. ix. p. 305. Leipsic, 1849.
[2] De Repub. lib. i. 2. [3] Lib. i. 3. [4] Lib. i. 6, 7.

vestigated and written much concerning public affairs, have discharged a species of political duty. And the seven whom the Greeks named wise absolutely employed themselves in the midst of public affairs. Nor is there any thing in which human virtue approaches nearer to the power of the Gods than in the founding of new States, or preserving those already founded:—Neque enim est ulla res, in qua propius ad deorum numen virtus accedat humana, quam civitates aut condere novas, aut conservare jam conditas.[1]

Scipio Africanus, the son of Paulus Æmilius, Quintus Tubero, and Lælius, are then introduced as spending the Latin holidays in the gardens of the first, and their conversation upon political science is given as related by Rutilius at Rhodes to Cicero in his youth. After some preliminary conversation, Scipio, on the request of the others, gives his views on the management of public affairs. The study of astronomy is contrasted with politics. What can he deem splendid in the affairs of men who has penetrated the realms of the gods,—or what can he deem durable who knows what is eternity, —or what can he deem glorious who sees how paltry is, first, the entire earth, next that part of it which men inhabit? And can we, placed in a small part of it, unknown to most nations, still hope that our name can circulate to the widest extent? How fortunate is he to be considered who may claim all things as his own, not by the law of the Quirites, but by the right of philosophers; not by the civil bond, but by the common law of nature, which forbids any thing to be the property of any man unless of him who knows how to treat and use it;—how fortunate is he to be deemed who considers military commands and consulships as necessary, not desirable things, to be undertaken in order to discharge a duty, not to be sought for glory and emolument; who, in fine, as Cato was wont to say of Africanus, deemed himself never more busy than when he did nothing, never less alone than when alone.[2] After some further

[1] Lib. i. 7. [2] Lib. i. 17. 26.

discussion Scipio proceeds to define the Commonwealth, —*res publica*. The Commonwealth is the state of the people. But the people is not every association of men gathered together in every way, but the association of a multitude allied by the compact of justice and the communion of utility. And the first cause of union is not so much weakness as the natural association of man: Est igitur, inquit Africanus, res publica res populi: populus autem non omnis hominum cœtus quoque modo congregatus, sed cœtus multitudinis juris consensu et utilitatis communione societas. Est autem prima causa coeundi non tam imbecillitas, quam naturalis quædam hominum quasi congregatio.[1] Every commonwealth in order to last must be governed by a certain authority. This authority must either be deposited in the hands of one monarch, be entrusted to certain delegates, or be undertaken by the multitude. All these single forms of government are liable to the greatest dangers. Therefore a fourth species of government is most to be approved, moderated and combined out of the three former. Itaque quartum quoddam genus rei publicæ maximè probandum esse sentio, quod est ex his quæ prima dixi moderatum et permixtum tribus.[2] And the state is such as is the nature or will of the governing power; wherefore liberty has no domicil in any other state unless in that in which the power of the people is supreme. After discussing the merits of the monarchical, democratical, and aristocratical systems, Scipio declares again that he approves of none separately, but prefers the system united of the three. Yet if one of the simple forms is to be preferred, that is the monarchical. But a revolution in an absolute monarchy is most certain. When the king begins to be unjust, that species of government perishes. If the nobles have overcome the king, as frequently happens, the state obtains the second constitution of the three, a council of the aristocracy consulting for the public benefit. If the people of themselves expel or slay a tyrant, so far as they are wise they are moder-

[1] Lib. i. 26. 39. [2] Lib. i. 39. 45.

ate, and strive to protect the commonwealth established by themselves. But if they raise their strength against a just king, or deprive him of his realm, or taste the blood of the nobles, and subject the whole commonwealth to their licence, no sea or fire is more difficult to appease than the unbridled insolence of the multitude.[1] From the extreme licence which alone they call liberty, Plato declares a tyrant must arise; for as from the excessive power of the nobles springs the destruction of the nobles, so this excessive liberty visits with slavery a people too free. All things in excess generally turn to their contraries; and this most of all happens in political affairs: for from this indomitable and capricious people is chosen some chief against their expelled leaders,—audacious, impure, insolently prosecuting those who have deserved best of the state, gratifying the people with both the property of others and his own. Finally, such men stand forth the tyrants of those by whom they were raised; which despots if the good citizens crush, the constitution is re-established; but if the wicked, faction becomes another species of tyranny. Thus tyrants snatch the sovereign power as a ball from the hands of kings; but from them the nobles or the people; from whom either factions or tyrants. Nor is the same constitution of government long maintained.[2] A mixed government is, therefore, the best. There should be in the commonwealth something pre-eminent and regal: something should be assigned to the authority of the nobles; some things reserved for the judgment of the multitude. This constitution possesses that great equality which free men cannot long be deprived of; secondly, stability, because the other forms easily change into their contraries: so that a tyrant starts up from a king, a faction from an aristocracy, a mob from a people. But in the united and mixed constitution of the commonwealth this cannot happen without the greatest vices in public men.[3]

In the second book Cicero reviews the history and development of the Roman constitution. Cato used to

[1] Lib. i. 42. 65. [2] Lib. i. 45. 68. [3] Lib. i. 45. 69.

say that the constitution of Rome on this account excelled all others, because in them individuals had established the state by their own laws and ordinances, as Minos that of the Cretans, Lycurgus that of the Spartans, Theseus, Draco, and Solon, and others, that of the Athenians. But the Roman constitution was not established by the genius of one man, but of many; nor in the life of one man, but in many ages and centuries. For he said there never yet existed an intellect that nothing could escape.[1]

After the history of the Roman Commonwealth, the second book concludes with an eulogium on the gradation of ranks proper in a state. The statesman must never cease from instructing and contemplating himself, so as to summon others to his imitation, in order that by the splendour of his intellect and life he may offer himself as a mirror to his fellow-citizens. For, as in lutes or harps, and as in song itself, a certain harmony must be obtained out of the distinctive tones, which, when changed or discordant, practised ears cannot bear; and that harmony is made concordant and consonant out of the modulation of dissimilar notes; so, from the highest, and lowest, and middle, and intervening ranks, as sounds, the state becomes harmonious from the concord of its dissimilar elements. And what is called by musicians harmony in song, this is concord in the state, the closest and best bond of security in every commonwealth. And this cannot exist without justice.[2] But all that has been said concerning the government of the state is nothing, unless this is established, that without the strictest justice no government can be long conducted.[3]

In the third book—one of the most magnificent relics of ancient philosophy—Cicero, in imitation of Plato, discusses whether justice be natural and immutable, or whether it rest only in opinion. Philus, in his argument against the inherent nature of justice, supports the character which the Sophists undertake in the Dialogues of Plato. Nature has treated man less like a mother than

[1] Lib. ii. 1. [2] Lib. ii. 42. 69. [3] Lib. ii. 44. 71.

a step-dame. He has been cast into mortal life with a body naked, fragile, and infirm; and a mind agitated by troubles, humbled by fears, weakened by labours, prone to the passions. In which, however, there lies, as it were hidden, a divine fire of genius and intellect. The pleasing tie of speech united men first divided. By this same intellect, a few characters having been invented, the infinite sounds of the voice are all designated and expressed, by which also converse is held with the absent, the symbols of our ideas and the memorials of the past recorded.[1] Political science and the discipline of nations, whether discovered by men practised in the variety of public affairs, or treated in their literary leisure, is to be honoured. In great intellects it attains an incredible and divine virtue; and if to these faculties of soul which are here received from nature or developed by social institutions there be added learning and an extensive knowledge of affairs, persons so gifted must be preferred to all others. For what can be more admirable than the management and practice of the grand affairs of state united to the study and knowledge of the arts? What can be more perfect than a Scipio, a Lælius, a Philus, who, omitting nothing that pertained to the glory of the greatest men, joined to the examples of our countrymen and ancestors the foreign philosophy of Socrates. Wherefore he has attained all things towards glory who has willed and accomplished the cultivation of himself, as well by the institutions of our ancestors as by learning. But if either path of wisdom is to be chosen, still, though the tranquil mode of life passed in the most excellent studies and arts may seem the more happy, this political science is the more laudable and illustrious, in which life the greatest men become glorious, like M. Curius, whom neither gold nor iron could subdue,—"Quem nemo ferro potuit superare nec auro."[2] Between philosophers and politicians there is this principal difference, that the former have developed the principles of nature by their writings and technical systems, the latter

[1] Lib. iii. 1. 1. [2] Lib. iii. 3. 6.

by their institutions and laws. But Rome has produced, if not sages, at least men worthy of the highest praise, since they have cultivated the precepts and discoveries of sages.[1] Philus, following out the argument of Carneades the Sophist, asks, if it be the duty of a just and good man to obey the laws, what are the laws? Are they all laws indifferently? But virtue does not permit inconsistency, nor does nature allow variety; and the laws are sanctioned by punishment, not by our fear of justice. Wherefore there is no natural right, and men are not just by nature. Alexander asked of a pirate by what audacity he infested the sea with one brigantine? He answered, "By the same with which you infest the world." This same Alexander, how could he, without taking the property of another, rule, enjoy so many pleasures, and reign supreme? Justice commands us to spare all, to consult for mankind, to give each one his own.[2] But worldly wisdom teaches us to gain wealth, power, riches from all. The answer to this sophism is obvious. Many things long existed in nature before they were perceived by human intelligence. Wherever a circle was, all the radii which sprang from its centre were equal, although it required the cultivation of mathematical studies in the brain of a clever man to perceive this fact.

Lælius replies to the sophisms of Philus in the celebrated passage on natural justice. There is a true law, a right reason, conformable to nature, diffused through all, constant, eternal, which by its commands summons to duty, by its prohibition deters from wrong; which, however, neither in vain commands or forbids the good, nor by its commands or prohibitions deters the wicked. This law it is not right to contradict, nor to derogate from any part of it, nor entirely to repeal it; nor can we be released from this law by the senate or by the people; nor is another expounder or interpreter of it to be sought; nor shall it be one law at Rome, another at Athens—one now, another hereafter. But the one eternal, immutable law must embrace all nations in all time,

[1] Lib. iii. 4. 7. [2] Lib iii. 12. 21.

and be the common master and lord of all. God himself is its author, promulgator, enforcer. He who shall not obey this law shall fly from himself, and, despising the nature of men, shall on this account suffer the greatest punishments, even if he escape the other usual misfortunes,[1]—Est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando a fraude deterreat, quæ tamen neque probos frustra jubet, nec improbos jubendo aut vetando movet. Huic legi nec obrogari fas est, neque derogari ex hac aliquid licet, neque tota abrogari potest; nec vero aut per senatum aut per populum solvi hac lege possumus; neque est quærendus explanator aut interpres ejus alius; nec erit alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit; unusque erit communis quasi magister et imperator omnium; deus ille legis hujus inventor, disceptator, lator; cui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas pœnas, etiam si cetera supplicia quæ putantur effugerit.[2] The virtue which obeys this law nobly aspires to glory, which is virtue's sure and appropriate reward—a prize she can accept without insolence and forego without repining. When one is inspired by virtue such as this, what bribes can you offer him?—what thrones, what empires? He considers these but mortal goods, and esteems his own divine.

Lastly, Cicero shows that patriotic statesmen will not only be rewarded on earth by the approval of conscience and the applause of the virtuous, but that they shall hereafter enjoy eternal happiness.[3]

The great works of Cicero, De Legibus and De Republicâ, were neglected by his contemporaries, and under the Empire were, we may imagine, almost proscribed. The ideas of eternal and immutable justice, of moral duty, of pure reason and liberty, were impossible to be understood by a people degraded in vice and ignorance. The scholiasts commented upon the grammar of Cicero's writings,

[1] Lib. iii. 22. 33. [2] De Repub. lib. iii. 23. [3] De Repub. lib. vi.

yet were unable to perceive their spirit. But the Christian Fathers of the Church first understood these admirable compositions. Whilst Diomedes Nonius and Aulus Gellius only analyzed the metaphors and ellipses used by Cicero, St. Augustine quotes the passages of the De Republicâ, and in magnificent language comments upon their philosophy.

Many things in the politics of Cicero are to be censured; he justifies the sway of the Roman people over the conquered provinces on the same principles which enable him with Plato and Aristotle to justify slavery; he did not understand the natural rights of man, the idea of which was reserved for a later and a Christian age. Much of his political system is but a paraphrase of the Grecian philosophy adapted to the larger induction of Roman history. But this is wrought out by him in the most splendid language, with all his most wonderful powers of composition. These sublime political truths so enounced were recognised and published by the Christian Fathers. And thus Cicero had an important result upon general civilization. Those who popularize certain axioms in politics do as much for mankind as those who discover and scientifically adjust them.

Cicero's treatise, De Legibus, was composed by him when in his fifty-sixth year, about two years after the publication of his treatise De Republicâ, to which it forms a supplement. It was written in imitation of his favourite model, Plato. The Greek philosopher wrote two dialogues on Government and Laws; the Roman felt an irresistible compulsion to do the same. The treatise on Laws was divided into six books, like the treatise on Government. Of these only three have come down to us. In the first he discusses the origin of laws and the sources of obligations, which he derives from the universal nature of things; or, as he explains it, the consummate reason and will of the supreme God. In the second and third books he gives a body of laws, conformable to his own plan of a well ordered state.[1]

[1] Dunlop's Roman Literature, vol. ii. 378.

The theory, in fact, which he announces in the first book is briefly this, that man being linked to a supreme God by reason and virtue, and the whole species being associated by a communion of feelings and interests, laws are alike founded on divine authority and natural benevolence. Reason prescribes the law of nature and nations. In the second book of the De Legibus, Cicero proceeds to set forth a body of laws. And since all law is divine or human, but regard should be paid first to the divine law, he first lays down the laws relating to religion and the worship of the gods. The third book contains the laws of the magistrates. The work, after the Platonic fashion, is cast in the form of a dialogue, in which Cicero, his brother Quintus, and Atticus are the speakers; and the introduction is directly imitated from the Phædrus of Plato. The scene is laid at his villa near Arpinum, his birthplace, on the banks of the Liris, beneath a shady grove, where grew an ancient oak. This oak reminds Atticus of the oak in the poem which Cicero wrote in eulogy of Marius; Quintus says as long as the Latin language is spoken this oak of Marius will not lose its reputation. But the poem which Cicero hoped to be immortal has long since perished with the oak.

The conversation then turns upon History; and Cicero, upon the plea of want of time, declines to write a history of the Roman Empire; but consents to give his sentiments on the subject of Universal Justice. From this investigation the Epicureans must retire who care not for the Republic. The New Academy must be silent, for her objections would destroy the well ordered structure of his lofty system. Zeno, Aristotle, and the disciples of Plato are the teachers who best prepare a citizen for social life. They had many great men in Rome who were wont to expound to the people the nature of law and explain its doctrines. But though they professed great things, they were practised in trifling. What can be grander or nobler than Jurisprudence? or what can be more insignificant than the practice of lawyers?—necessary as it is for the people. In no kind of discussion

can we more advantageously investigate the faculties which man owes to nature, and the capacity of the human mind for the noblest enterprises. The true objects of thought and action should be discussed for which we were born into the world, and the beautiful association and fellowship which bind men together by reciprocal charities; when we have fathomed these grand and universal principles of morals, we shall discover the true fountain of laws and rights. Not in the edict of the prætor, not in the laws of the Twelve Tables, but in the depths of philosophy, must the knowledge of jurisprudence be sought.[1] With respect to the true principles of justice, it is laid down:—Law is the highest reason implanted in nature, which prescribes those things which ought to be done, and forbids the contrary;—Lex est ratio summa, insita in naturâ, quæ jubet ea, quæ facienda sunt, prohibetque contraria.[2] Some have, therefore, conceived that moral prudence is a law, the force of which is to command us to do good, and forbid us to sin. They have thought also that law is called by the Greek name νόμος, which is derived from νεμὼ to distribute, from giving to every man his due. But Cicero considers that the moral essence of Law is better expressed by its Latin name, lex, which conveys the idea of selection or discrimination. For as the Greeks placed the essence of Equity, so the Romans placed the essence of selection, in Law. But nevertheless both these characteristics are proper to Law; which, if it be correct, the origin of justice is to be sought in this Law, meaning thereby the eternal Law of Morality. This, indeed, is the true energy of nature, the very soul and essence of wisdom, the rule of right and wrong. And the principles of justice must be established on that supreme law which had its origin before all the ages, before any law was written or government constituted.

Man is the only creature amongst so many races of animated beings, who has a share in that reason and

[1] De Legibus, lib. 1. c 5. (Wagner's edition, Göttingen, 1804.)
[2] Lib. 1. c. 6.

thought, in which the rest are deficient. And what is there, not in man alone, but in all heaven and earth more divine than reason, which when it has grown to maturity and become perfect, is rightly termed wisdom.

There exists, therefore, since nothing is better than reason, and since this is the common property of God and man, an original partnership in reason between God and man. Now, virtue is the same in the Deity and in man. This virtue is nothing else than a nature perfect in itself, and developed to the highest degree of perfection. There exists, therefore, a similitude between God and man; nor can any knowledge be more appropriate and sterling than what relates to this divine similitude. Nature, attentive to our wants, offers us her treasures with the most graceful profusion. And we may easily perceive that the benefits which flow from her are true and veritable gifts, which Providence has provided on purpose for human enjoyment; and not the fortuitous productions of her exuberant fertility. Innumerable arts have likewise been discovered by the teaching of nature; for reason doth imitate her, and skilfully discover all things necessary to the happiness of life.[1]

Man himself this same Nature has not only adorned with activity of mind, but has also bestowed on him the senses as guardians and messengers; and she has laid bare the necessary understanding of many obscure principles, as the foundations of some knowledge, and given us a mould of frame suitable and fit for the human mind. It is not necessary to dwell upon these faculties and capabilities of the body,—the modulation of the voice,—the power of speech, which is the greatest harmonizer of human society,—orationis vim quæ conciliatrix est humanæ maximè societatis.

Of all things which are the subjects of discussion amongst learned men, nothing is certainly more important than that it should be plainly understood, that we are born for Justice, and that Right is not founded on Opinion, but in Nature,—nos ad justitiam esse natos

[1] Lib. i. c. viii.

neque opinione sed naturâ constitutum esse jus.[1] Although Cicero had borrowed so much from the Greek philosophy, his mind revolted at many of its disfiguring errors. The system of castes adopted by Plato and Aristotle is rejected by Cicero. He expressly holds the principle, that in the conduct of life every one ought to look to his own nature; every one ought to choose a mode of life and vocation agreeable to his natural disposition; one will rightly devote himself to philosophy, another to war, a third to oratory, and others to such occupations as they may severally deem to be becoming a free citizen. Blindly to follow a paternal profession, or to do a thing because it is the general fashion, is highly foolish.[2] Ritter has observed[3] that in perusing the political writings of Cicero, it should be borne in mind that many doubts would naturally suggest themselves to the mind of a politician who had not entirely withdrawn from public life, of the expediency of promulgating his own opinions of the constitution of his country, and its administration, and deter him from expressing openly and unreservedly the peculiar instructive and valuable conclusions which his long experience had enabled him to form.

4. The development of the Roman law in itself had the most important effect upon the cultivation and progress of Jurisprudence. For Rome was the first state that gave to law a complete organization. Under Oriental despotisms, Law never could have permanence; nor could be raised to the dignity of system. The irresponsible Eastern Judges decided through prejudice, bribery, or chance. Under the turbulent democracies of Greece, with their tribunals composed of hundreds of unaccountable citizens swayed by the politics of the hour, Law could have no stability or systematic and coherent form. In both cases the precedent of to-day would be set aside by the caprice of to-morrow. But from the contests of the equally balanced parties, the patricians and plebeians; from the labours of the patrons in the

[1] Lib. i. c. 10. [2] De Off. i. 32, 33. [3] B. xii. c. 2.

service of their clients; from the long succession of the Jurisconsults; from wealth, security, and centralization arose, first, the importance and cultivation of the Roman Law.

Its magnificent development arose from other causes. The liberties of Rome were destroyed by Augustus; and all the avenues to political distinction were closed to independent merit under the empire. Then those who in former times would have been the captains and statesmen of the Commonwealth were driven out of the sphere in which their ancestors had shone. But they had recourse to other pursuits: eloigned from politics, they endeavoured by the study of Jurisprudence to keep alive some traditions of the Republic, to pay the debt which Lord Bacon holds we all owe to our profession, and to entitle themselves to the gratitude of their countrymen. Similarly on the Continent at present in France, Germany, and Italy, where political liberty is almost extinct, Law is studied as a science, and cultivated with enthusiasm. In Great Britain and Ireland all but its immediate practitioners neglect the study of the law; and with them it is only a profession.

The Civil Law is one of the greatest triumphs of the human intellect. The rich treasures of its ancient wisdom must be left unused by us no longer. There are numerous and important reasons for its cultivation. To classical students who purpose to pursue the legal profession, no part of their labours will be so useful as the study of the laws and constitution of Ancient Rome. To those who have the taste and leisure for the most extended classical studies, a knowledge of the elements of the Civil Law is essential for the proper application of Cicero and many other Roman authors. Again, the study of the Civil Law ought to be cultivated, because in it is the origin of most of the systems now prevalent in European countries; and in order that the laws which regulated and are the types of the ancient civilization may be compared with the laws governing the present complicated combinations of society. In the admirable

forms of some portions of the Civil Law are suggestions which might be useful to modern legal reformers. By studies such as these the student will readily obtain a quick perception of legal fitness and analogy; in no other way will he so speedily form a legal mind.

At the same time unqualified praise must not be given to the Civil Law. The value of the Civil Law is not to be found in questions that relate to the connexion between the government and the people, or in provision for personal security, and a fair trial in criminal cases. In all that concerns civil and political liberty, it is not to be compared with the free spirit of the English Common Law. But, to use the words of Sir William Jones, in questions of Natural Law, no cause can be assigned why we should not shorten our own labours, by resorting occasionally to the wisdom of ancient jurists, many of whom were the most ingenious and sagacious of men. What is good sense in one age must be good sense in another, all circumstances remaining the same; and pure unsophisticated reason is the same in Italy and England, in the mind of a Papinian and a Blackstone. Upon all subjects relating to private rights, personal contracts, and the duties flowing from them, there is no system of law in which principles are investigated with more good sense, or declared or enforced with more impartial justice.

The scientific development of the Roman law is best evidenced by the definitions given by the learned jurists who accomplished its great codification under Justinian. In the Institutes are found the following definitions—"Justitia est constans et perpetua voluntas jus suum cuique tribuere. Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia."[1] This is a correct definition of the virtue of justice as the constant and perpetual disposition to give every man his right. But it is not a correct definition of justice as capable of being enforced by the government of a country, inasmuch as only a limited class of rights and their

[1] Institutes, tit. l. 1.

correlative duties is capable of being protected and enforced by the public authority. The details of domestic life, the exercise of the virtues of benevolence and gratitude, the duties we owe to society in good conduct and the beneficent administration of property—these things are all beyond the sphere of justice as possible to be administered in our courts of law. The following is Justinian's definition of natural law—"Jus naturale est quod natura omnia aimalia docuit. Nam jus istud non humani generis proprium est, sed omnium animalium quæ in cœlo, quæ in terrâ, quæ in mari nascuntur."[1] According to this definition the term natural law embraces all the principles of nature common to all animals. But natural law, as now understood, only implies the theory of that part of our duties which is capable of being enforced. The phrase, *jus gentium*, as used by the Roman jurists, corresponds more nearly to the modern term natural law. "Jus autem gentium omni humano generi commune est." And so the phrase appears to designate the natural principles of right common to all. The Law of Nations was almost unknown to the Romans, nor have we any important records of their *jus feciale.*

The edicts of the Prætors and other Judicial magistrates in time supplied the deficiencies of the Common Law of Rome. The edicts appeared to have sprung from the inherent power which every supreme court has to enact rules for its own guidance; but the edicts of the Roman Prætors gradually went far beyond this limited jurisdiction, and built up a system of Equity which finally completely superseded the ancient Roman Common Law. In the time of the Emperor Hadrian the perpetual edict was composed, and superseded the Twelve Tables as the invariable standard of Civil Jurisprudence.

As the number of the acts and constitutions of the Emperor, the edicts of the Prætor, and the commentaries of the learned increased, the rules of Law became more difficult to ascertain, until these different laws were

[1] Institutes, tit. 2.

compiled in the Gregorian, the Hermogenean, and the Theodosian codes.

Gibbon remarks that among savage nations the want of letters is imperfectly supplied by the use of visible signs which awaken attention and perpetuate the remembrance of any public or private transaction. The Jurisprudence of the first Romans exhibited the scenes of a pantomime; the words were adopted to the gestures, and the slightest error or neglect in the forms of proceeding was sufficient to annul the substance of the fairest claim. The period of a thousand years from the Twelve Tables to the reign of Justinian may be divided into three periods almost equal in duration, and distinguished from each other by the mode of instruction and the character of the lawyers. The periods were first mentioned by Gibbon, and they have been adopted by Hugo. During the first period the Roman Law was confined within the limits of the consultations between the patrons and their clients. The second period extended from the time of Cicero to the reign of Alexander Severus; then a system was formed, schools were instituted, and books were composed. During this period lawyers and professors compiled the enormous number of treatises on law which were afterwards digested in the Pandects. The third period of Roman Jurisprudence is between the reigns of Alexander Severus and Justinian. During this period legal authorship ceased. Lawyers were content to repeat the lessons taught by their predecessors, and the law was finally consolidated under Justinian. Long after the development of the Roman law had finally ceased the complete consolidation of the Roman law took place. The Codification of law is impossible until the development of the society and the law has been arrested.

The four compilations executed by the commissioners under the direction of Justinian are the *Code*, *Pandects* or *Digest*, the *Institutes*, and the *Novels*. These four constitute the Corpus Juris Civilis. The Code was the collection of the Imperial constitutions. When the legislative power of the senate and of the several comitia was

abolished, the laws drawn up by the Imperial ministers and promulgated by the Imperial authority alone were termed Constitutiones. The Code occupied only one year in the compilation, and was published A.D. 529. The Digest was a compilation from the *responsa prudentum*. Sixteen commissioners in three years selected 9,000 extracts from 2,000 different treatises on law. This was published A.D. 533. The Institutes were designed as an elementary treatise for the use of students and candidates for the civil services of the Roman Empire. They are based upon the Institutes of Gaius, and were digested by Theophilus, Dorotheus, and Tribonian. The latter celebrated minister superintended the whole system of codification accomplished by Justinian. The Institutes were published A.D. 533. The Novels—novellæ constitutiones—were the new constitutions published between 534 and the death of Justinian, 564. "The vain titles of the victories of Justinian have crumbled into dust; but the name of the legislator is inscribed on a fair and everlasting monument."

The consolidation of the Roman law under Justinian was certainly one of the greatest achievements ever accomplished in the history of the world. We have no authentic record whether the original idea of this scheme was owing to Justinian himself or to his celebrated minister Tribonian. In the first year of Justinian's reign Tribonian and nine other commissioners received instructions to revise the Imperial constitutions from the time of Hadrian in the Gregorian, Hermogenean, and Theodosian codes; to retrench whatever was obsolete or superfluous; and to select those laws best adapted to the practice of the tribunals and the use of the subjects. These constitutions of the emperors exactly corresponded to the English acts of parliament. The Code of Justinian was a digest of the statute law of the Roman Empire, and as such was transmitted to the magistrates of the European, Asiatic, and African Provinces.

The Code was by no means exhaustive of the body of the Roman law. No matter under what arbitrary prin-

ciple the laws of a country may be enacted or administered, there will be always besides the statute law a common law, whose external forms are seen in the decisions of the judges, the opinions of the learned, and the customs of the people. These were digested in the Pandects.

5. I have thought right to give an analysis of the Institutes of Justinian. In its principles it is law in England, France, Germany, and Italy. An old writer has said—"Time hath his revolutions; there must be a period and an end to all temporal things—finis rerum —an end of names and dignities, and whatever is terrene; for where is Bohun? where is Mowbray? where is Mortimer?—nay, which is more and most of all, where is Plantagenet? They are entombed in the urns and sepulchres of mortality." So the names of those who compiled the Institutes are forgotten. But the legal works of the old Romans to this day influence the life of every citizen in Europe and America.

The Institutes commence with a short statement of the reasons for their publication.

The imperial dignity should not only be supported by arms, but guarded by laws, that the people may be properly governed in time of peace as well as war; for a Roman emperor ought not only to be victorious in the hostile field, but should take every legal course to expel the iniquities of men regardless of law; and become equally renowned for a religious observance of justice, as for warlike triumphs. When the hitherto confused mass of imperial constitutions had been arranged and brought into lucid harmony, attention was directed to the numerous volumes of ancient law. So soon as, by the blessing of God, this was accomplished, Tribonian, Theophilus, and Dorotheus, men of known learning, and tried fidelity, were enjoined to compose the Institutes, that the rudiments of law might be more effectually learned, that the minds of students for the future should not be burdened with obsolete and unprofitable doctrines, but instructed in those laws only which are allowed and practised. When, therefore, by the assistance of Tribo-

nian and other illustrious persons, the fifty books called Digests or Pandects had been compiled, it was directed that the Institutes should be divided into four books, which serve as elements of the science of law. The four books of Institutes thus compiled by Tribonian, Theophilus, and Dorotheus, from all the institutions of the ancient law, but chiefly from the commentaries, institutions, and other writings of Caius, were read and diligently examined, and received the approbation of the Emperor at Constantinople on the eleventh day before the calends of December, in the third consulate of the Emperor Justinian. (21st Nov., A.D. 533.)[1]

The first title is—De Justitia et Jure.—Justice is the constant and perpetual disposition to render every man his due. Jurisprudence is the knowledge of things divine and human; the science of what is just and unjust.[2]

The precepts of the law are, to live honestly, to hurt no one, to give to every man his due. The law is divided into public and private. Public law regards the state of the commonwealth: but private law, of which we shall here treat, concerns the interests of individuals; and is tripartite, being collected from natural precepts, from the law of nations, and from municipal regulations.[3]

The second title is—De Jure Naturali, Gentium, et Civili.—The law of nature is a law not only to man, but likewise to all other animals, whether produced on the earth, in the air, or in the waters.[4]

Civil law is distinguished from the law of nations, because every community governed by laws, uses partly its own, and partly the laws which are common to all mankind. That law, which a people enacts for its own government, is called the civil law of that people. But that law which natural reason appoints for all mankind, is called the law of nations,—jus gentium,—because all nations make use of it. The people of Rome are governed partly by their own laws, and partly by the laws which are common to all men.[5]

[1] Preface. [2] Book i. t. 1. s. 1. [3] Book i. t. 1. s. 3, 4.
[4] Book i. t. 2. [5] Book i. t. 2. s. 1.

Civil laws take their denomination from that city in which they are established; it would not therefore be erroneous to call the laws of Solon or Draco, the civil laws of Athens: and thus the law which the Roman people make use of, is styled the civil law of the Romans. Whenever we mention the words civil law, without addition, we emphatically denote our own law: thus the Greeks, when they say the poet, mean Homer, and the Romans Virgil. The law of nations is common to all mankind, and all nations have enacted some laws, as occasion and necessity required; for wars arose, and the consequences were captivity and servitude; both which are contrary to the law of nature; for by that law all men are born free. But almost all contracts were at first introduced by the law of nations,—jus gentium,—as, for instance, buying, selling, letting, hiring, partnership, a deposit, a loan, and others without number.[1]

The Roman law is divided, like the Grecian, into written and unwritten. The written consists of the plebiscita, the decrees of the senate, ordinances of princes, the edicts of magistrates, and the answers of the sages of the law—responsa prudentum.[2]

A law is what the Roman people enact at the request of a senatorial magistrate; as a consul. A plebiscitum is what the commonalty enact, when requested by a plebeian magistrate, as a tribune. The word commonalty differs from people, as a species from its genus; for all the citizens, including patricians and senators, are comprehended under the term people. The term commonalty, includes all the citizens except patricians and senators. The plebiscita, by the Hortensian law, began to have the same force as the laws themselves.[3]

A senatorial decree is what the senate commands and appoints; for, when the people of Rome became so increased, that it was difficult to assemble them for the enacting of laws, it seemed right, that the senate should be consulted instead of the people. The ordinance of the prince has also the force of a law; for the people by

[1] Book i. t. 2. s. 2. [2] Book i. t. 2. s. 3. [3] Book i. t. 2. s. 4.

the lex regia, make a concession to him of their whole power. Therefore whatever the emperor ordains by rescript, degree, or edict, is law. Such acts are called constitutions. Of these, some are personal, and are not to be drawn into precedent; for, if the prince has indulged any man on account of his merit, or inflicted any extraordinary punishment on a criminal, or granted some unprecedented assistance, these acts extend not beyond the individual. But other constitutions being general, undoubtedly bind all. The edicts of the prætors are also of great authority. These edicts are called the jus honorarium, because the magistrates who bear honours in the state have given them their sanction. The curule ædiles also, upon certain occasions, published their edicts, which became a part of the jus honorarium. The answers of the lawyers are the opinions of persons authorized to give answers on matters of law. For anciently, public interpreters of the law were licensed by the emperors, and were called juris-consulti; and their opinions obtained so great an authority, that it was not in the power of a judge to recede from them.[1]

The unwritten law is that which usage has approved; for daily customs, established by the consent of those who use them, put on the character of law. Nor is it an inelegant division of the law into written and unwritten; which seems to have taken rise from the peculiar customs of the Athenians and Lacedemonians. For the Lacedemonians trusted chiefly to memory for the preservation of their laws; but the laws of the Athenians were committed to writing. The laws of nature observed by all nations, inasmuch as they are the appointment of divine providence, remain fixed and immutable. But the laws which every city has enacted for itself, suffer frequent changes, either by tacit consent of the people, or by some subsequent law. All laws relate to persons, things, or actions.[2]

After the division of persons into freemen and slaves another is given. And the eighth title is—De his, qui

[1] Book i. t. 2. ss. 5–8. [2] Book i. t. 2. ss. 9–12.

sui vel alieni juris sunt.—Some persons are independent, and some are subject to the power of others. Of those who are subject to others, some are in the power of parents, others of their masters. All slaves are in the power of their masters, a power derived from the law of nations; for it is observable among all nations, that masters have always had the power of life and death over their slaves, and that whatever the slave acquires is acquired for the master. All subjects are now forbidden to inflict any extraordinary punishment upon their slaves, without legal cause. For, by a constitution of Antoninus, whoever causelessly kills his own slave, is to be punished equally as if he had killed the slave of another. The too great severity of masters is also restrained by another constitution of Antoninus, who being consulted by certain governors of provinces concerning slaves, who take sanctuary either in temples, or at the statues of the emperors, ordained, that if the severity of masters should appear excessive, they might be compelled to make sale of their slaves upon equitable terms, so that the masters might receive the value, and properly; inasmuch as it is for the public good, that no one should be permitted to misuse even his own property.[1]

The ninth title is—De Patria Potestate.—Children, begotten in lawful wedlock, are under our power. Matrimony is a connexion between a man and woman, implying a mutual and exclusive co-habitation during life. The power over children is peculiar to the citizens of Rome; for no other people have the same power over their children. The citizens of Rome contract valid matrimony, when they follow the precepts of the law; males when they arrive at puberty, and females, when they attain to a marriageable age. The males, whether patres familiarum, fathers of a family, or filii familiarum, sons of a family; but, if they are sons of a family, they must first obtain the consent of the parents, under whose power they are. For reason, both natural and civil, con-

[1] Book i. t. 8. ss. 1, 2.

vince that the consent of parents should precede marriage.[1]

Not only all legitimate children are subject to paternal power, but those also who are adopted. Adoption is made two ways, either by imperial rescript, or authority of the magistrate. The imperial rescript empowers all to adopt persons of either sex, who are sui juris, (i.e. independent), and this species of adoption is called arrogatio. But it is by the authority of the magistrate that persons actually under the power of their parents are adopted, whether they are in the first degree, as sons and daughters; or in an inferior degree, as grand-children, or great grand-children.[2]

The twelfth title is—Quibus modis jus Patriæ Potestatis solvitur.—Let us now inquire how persons can be freed. Those who are under the power of a parent become independent at his death; yet this rule admits of a distinction. When a father dies, his sons and daughters are, without doubt, independent; but, by the death of a grand-father, his grand-children do not become independent, unless there is an impossibility of their ever falling under the power of their father. Therefore, if their father is alive at the death of their grand-father, in whose power the father was, they then become subject to the power of their father. But, if their father is either dead or emancipated before the death of their grand-father, they then cannot fall under the power of their father, but become independent. If a man, upon conviction of some crime, is deported into an island, he loses the rights of a Roman citizen; and it follows, that the children of a person thus banished, cease to be under his power, as if he was naturally dead. And by parity of reasoning, if a son is deported, he ceases to be under the power of his father.[3]

Of those who are not under the parental power, patria potestas, some are under tutelage, some under curation, and some under neither. Let us inquire what persons are under tutelage and curation; for thus we shall ascertain

[1] Book i. t. 9. ss. 1–3; t. 10. [2] Book i. t. 11. s. 1. [3] Book i. t. 12. s. 1.

who are not subject to either. And first of persons under tutelage. Tutelage, as Servius has defined it, is an authority and power, given and permitted by the civil law, over such independent persons, as are unable, by reason of their youth, to protect themselves. Tutors are those who have this authority and power; and they take their name from the nature of their office. For they are called tutors, quasi tuitores, defenders.[1]

The Agnati, by a law of the Twelve Tables, are appointed tutors to those to whom no testamentary tutor was given; and these tutors are called legitimi, tutors by law. Agnati are those who are collaterally related to us by males, as a brother by the same father, or the son of a brother, or by him a grandson; also a father's brother, or the son of such brother, or by him a grandson. But those who are related to us by a female, are not agnati, but cognati, bearing only a natural relation to us.[2]

The authority or confirmation of a tutor is in some cases necessary, and in others not. When a man stipulates to make a gift to a pupil, the authority of the tutor is not requisite; but, if a pupil enters into a contract, it is so; for the rule is, that pupils may better their condition, but not impair it, without the authority of their tutors. And therefore in all cases of mutual obligation, as in buying, selling, letting, hiring, mandates, deposits, etc., he who contracts with a pupil is bound by the contract; but not the pupil, unless the tutor hath authorized it.[3]

The first book of the Institutes treated of persons; the second book is entitled—De Rerum Divisione, et Acquirendo Earum Dominio.—Things may be divided into such as are, and such as are not within our patrimony, for some things are in common by the law of nature; some are public; some universal; and some there are to which no man can have a right. But most things are the property of individuals, by whom they are variously acquired, as will appear hereafter. Things common to

[1] Book i. t. 13. ss. 1, 2. [2] Book i. t. 15. s. 1. [3] Book i. t. 21.

mankind by the law of nature are the air, running water, the sea, and, consequently, the shores of the sea; no man, therefore, is prohibited from approaching any part of the sea-shore, whilst he abstains from damaging farms, monuments, edifices, etc. which are not in common as the sea is. Rivers and ports are public; hence the right of fishing in a port or in rivers are in common. Theatres, ground appropriated for a race, or public exercise, and things of this nature, which belong to a whole city, are public, and not private property. Things sacred, religious, and holy, belong to no individual: for that which is of divine right is not private property. Things which have been duly consecrated by the pontiffs, are sacred; as churches, chapels, and movables, properly dedicated to the service of God. Wild beasts, birds, fish, and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become by natural law the property of the captor; for natural reason gives to the first occupant that which had no previous owner; and it is not material whether a man take wild beasts or birds upon his own, or upon the ground of another: although, whoever has entered into the ground of another, for the sake of hunting or fowling, might have been prohibited by the proprietor if he had foreseen the intent. Whatever of this kind you take is regarded as your property while it remains under your coercion; but when it has escaped your custody, and recovered its natural liberty, it ceases to be yours, and becomes the property of the first who seizes it. It is understood to have recovered its natural liberty if it has escaped your sight; or, although not out of sight, yet if it cannot be pursued and retaken without great difficulty.[1]

The second title of the second book is—De Rebus Corporalibus et Incorporalibus.—Things are corporeal, others incorporeal. Things corporeal are tangible; as lands, slaves, vestments, gold, silver, and others innumerable. Things incorporeal are those which are not tangible, but consist in rights and privileges; as inherit-

[1] Book ii. t. 1. ss. 1, 2, 6, 7, 8, 12.

ances, usufructs, uses, and all obligations however contracted; nor is it an objection that things corporeal are contained in an inheritance; for fruits gathered from the earth are corporeal; and that also is generally corporeal which is due to us upon an obligation; as a field, a slave, or money; for, the right to an inheritance, the right of using and enjoying any particular thing, and the right of an obligation are undoubtedly incorporeal. To these may be added the rights (or qualities) of rural and city estates, termed servitudes. The rights or servitudes of rural estates are: a path, iter; a road, actus; an highway, via; and an aqueduct, or free passage for water. A path is the right of passing and repassing on foot over another man's ground, but not of driving cattle or a carriage over it. A road implies the liberty of driving either cattle or carriages; hence he who hath a path hath not a road, but he who hath a road hath inclusively a path; for he may use such road when he doth not drive cattle. A highway imports the rights of passing, driving cattle, etc., and includes in it both a path and a road; and an aqueduct imports the right of leading water through the grounds of another. The servitudes of city estates are such as appertain to buildings; they are so called because we call all edifices city estates, though built upon farms or in villages. It is required by city servitudes that neighbours should bear the burdens of neighbours, and by such services one neighbour may be permitted to place a beam upon the wall of another; may be compelled to receive the droppings and currents from the gutters of another man's house, upon his own house, area, or sewer; or may be exempted from receiving them; or may be restrained from raising his house, so as to darken the habitation of his neighbour. Among rural servitudes we ought to reckon the right of drawing water, watering and feeding cattle, burning lime, digging sand, in the ground of another.[1]

Usufruct is the right of using and enjoying, without consuming or destroying, things which are the property

[1] Book ii. t. 2; t. 3. ss. 1, 2.

of another. It is a right over a corporeal substance ; if the substance perish, the usufruct must cease. The usufruct and the naked use of a thing are constituted and determined by the same means. Less right appertains to the use of a thing than the usufruct ; for he who has but the use of lands is understood to have nothing more than the liberty of using so much of the herbs, fruit, flowers, hay, straw, and wood, as may be sufficient for his daily supply ; and he is permitted to be commorant upon the land, on condition that he neither becomes troublesome to the owner, nor impedes the labours of the husbandmen. Neither can he let, sell, or give his right to another, which an usufructuary may.[1]

By the civil law, whoever had fairly obtained a thing from one whom he supposed the true owner, (although in reality he was not), and, if a moveable, had possessed it bonâ fide for one year, either in Italy or the provinces; or, if immoveable for two years within the limits of Italy, could prescribe to such thing by use ; and this was held to be law, lest the dominion or property of things should be uncertain. But although it was thought by ancient legislators that these periods were sufficiently long to enable every owner to search after his property, yet a better opinion occurred to Justinian, that the true owners be not defrauded or too hastily excluded by the circumscription of time and place, from recovering their just due ; Justinian therefore provided that things moveable may be prescribed to after the expiration of three years, and that a possession, during a long tract of time will also found a prescription to things immoveable—that is to say, ten years, if the parties are present, (i. e. in the province), and twenty years if either of them be absent. Property may thus be acquired not only in Italy, but throughout the Roman dominions, if the possession was honestly obtained at first. No prescription lies for things that have been stolen or seized by violence, although they have been possessed bonâ fide during the length of time required by our constitution ; for prescription to

[1] Book ii. t. 4 ; t. 5. s. 1.

things stolen is prohibited by a law of the Twelve Tables, and by the law Atilia; and the laws Julia and Plautia forbid a prescription to things seized by violence.[1]

Donation or gift is another mode of acquiring property; it is of two kinds; on account of death, and not on account of death. A donation mortis causa is made under apprehension of death; as, when any thing is given upon condition that, if the donor dies, the donee shall possess it absolutely; or return it if the donor should survive, or should repent of having made the gift; or if the donee should die before the donor. Donations made without apprehension of death, called donations inter vivos, admit of no comparison with legacies: for when once perfected they cannot be rashly revoked: they are esteemed perfect when the donor has manifested his will either in writing or otherwise.[2]

A testament is so called from testatio; because it testifies the determination of the mind. But, lest ancient usage should be forgotten, it is necessary to observe, that formerly there were two kinds of testaments; one practised in times of peace, and named calatis comitiis, because made in a full assembly of the people; and the other when the people were going forth to battle, and this was the procinctum testamentum. A third species was afterwards added, called per æs et libram, being effected by emancipation; which was an alienation made by an imaginary sale in the presence of five witnesses, and the libripens or balance-holder, all citizens of Rome, above the age of fourteen; and also in the presence of him who was called the emptor familiæ, or purchaser. The two former kinds of testaments have been disused for many ages; and that which was made per æs et libram, although it continued longer in practice, has now ceased in part to be observed. These three kinds of testament originated from the civil law; but afterwards another kind was introduced by the honorary or prætorian edict; whereby the signatures of seven witnesses was decreed sufficient to establish a will without

[1] Book ii. t. 6. s. 2. [2] Book ii. t. 7. ss. 1, 2.

any emancipation or imaginary sale ; but this signature of witnesses was not required by the civil law. When the civil and prætorian laws began to be blended partly by usage, and partly by the emendation of imperial constitutions, it became a rule that all testaments should be made at one and the same time according to the civil law ; that they should be sealed by seven witnesses according to the prætorian law, and that they should also be subscribed by the witnesses, in obedience to the constitutions. Thus the law of testament seems to be tripartite ; for the civil law requires witnesses to make a testament valid, who must all be present at the same time without interval ; the sacred constitutions ordain that every testament must be subscribed by the testator and the witnesses ; and the prætorian edict requires sealing, and settles the number of witnesses. To all these solemnities, additional security of testaments, and for the prevention of frauds, was added by Justinian, that the name of the heir shall be expressed by the handwriting, either of the testator or of the witnesses ; and that every thing shall be done in conformity to the tenor of the Roman constitutions.[1]

The before-mentioned strict observance of formalities in the construction of testaments, is dispensed with by the imperial constitutions in favour of all military persons, on account of their unskilfulness in these matters. For, although they should neither call the legal number of witnesses, nor observe any other solemnity, yet they may make a good testament if they are in actual service.[2]

A man by testament may appoint many degrees of heirs ; as thus : if Titius will not, let Seius be my heir. And he may proceed in such a substitution as far as he shall think proper ; and lastly, in default of all others, he may constitute a slave his necessary heir.[3]

A testament, legally made, remains valid until it be either broken or rendered ineffectual. A testament is broken when the force of it is destroyed, while the testator still remains in the same state. For if, after making

[1] Book ii. t. 10. ss. 1–4. [2] Book ii. t. 11. [3] Book ii. t. 15.

his testament, he should arrogate an independent person by license from the emperor, or in the presence of the prætor, should adopt a child under the power of his natural parent, by virtue of the constitution, then that testament would be broken by this agnation, or quasi-birth of a proper heir. Testaments legally made are also invalidated if the testator suffer diminution (that is, change his condition). In case of diminution, testaments are said to become irrita (ineffectual); although those which are broken, or which, from the beginning, were not legal, are equally so.[1]

Since parents often disinherit their children without cause, or omit to mention them in their testaments, it has therefore been introduced, that children who have been unjustly disinherited or omitted may complain that such testaments are inofficious, under colour that their parents were not of sane mind when they made them; not that the testator was really insane, for the testament may have been well made, but that it is not consistent with the duty of a parent. For if a testator were really insane at the time, his testament is null.[2]

Heirs are divided into three sorts—necessary, proper and necessary, and strangers. A slave instituted by his master is a necessary heir; and he is so called because, at the death of the testator, he becomes instantly free, and is compellable to take the heirship; he, therefore, who suspects his circumstances commonly institutes his slave to be his heir in the first, second, or some other place; so that, if he does not leave a sum equal to his debts, the goods which are seized, sold, or divided among his creditors, may rather seem to be those of his heir than his own. Proper and necessary heirs are sons, daughters, grand-sons or grand-daughters by a son, or other direct descendants, in the power of the deceased at the time of his death. All other heirs, not subject to the power of the testator are called strangers; thus, children, not under the power of their father, but who are constituted his heirs, are strangers in a legal sense;

[1] Book ii. t. 17. ss. 1, 4, 5. [2] Book ii t. 18

and so are children instituted heirs by their mother, for a woman is not allowed to have her children under her own power. A slave, also, whom his master had instituted by testament, and afterwards manumitted, is so accounted.[1]

A legacy is a gift directed by the deceased, and to be fulfilled by the heir. Anciently there were four kinds of legacies in use, namely, per vindicationem, per damnationem, sinendi modo, and per præceptionem. To each of these was assigned a certain form of words, by which their different species were signified; but these fixed forms have been wholly taken away by the imperial ordinance. A testator may not only bequeath his own property or that of his heir, but also the property of others; and if the thing bequeathed belong to another, the heir can be obliged either to purchase and deliver it, or to render the value of it, if it cannot be purchased.[2]

An obligation is the chain of the law, by which we are necessarily bound to make some payment, according to the laws of our country. Obligations are primarily divided into two kinds, civil and prætorian. Civil obligations are such as are constituted by the laws, or by any species of the civil law. Prætorian obligations are such as the Prætor hath appointed by his authority, and are also called honorary. The second or subsequent division of obligations is four-fold—by contract, by quasi-contract, by malfeasance, and by quasi-malfeasance. Those which arise from contract are also four-fold; for obligations are contracted by the thing itself, by parol, by writing, or by consent of parties.[3]

An obligation may be founded on the thing itself, as by the delivery of a loan or mutuum. He, also, to whom the use of any particular thing is granted or commodated, is bound by the delivery of the thing, and is subject to the action commodataria. But such person widely differs from him who hath received a mutuum; for a commodatum, or thing lent, is not delivered with the intent that it should become the property of the

[1] Book ii. t. 19. ss. 1–3. [2] Book ii. t. 20. ss. 1, 2, 4. [3] Book iii. t. 14. ss. 1, 2.

receiver, and therefore he is bound to restore the identical thing received. A person intrusted with a deposit, depositum, is bound by the delivery of the thing, and is subject to an action of deposit, because he is under an obligation of making restitution of that very thing which he received. But a depositary is only thus answerable on account of fraud; for where a fault only can be proved against him, such as negligence, he is under no obligation; and he is, therefore, secure, if the thing deposited be stolen from him, even although it were carelessly kept. For he who commits his goods to the care of a negligent friend should impute the loss, not to his friend, but to his own want of caution. A creditor, also, who hath received a pledge, pignus, is bound by the delivery of it; for he is obliged to restore the very thing which he hath received, by the action called pigneratitia. But, inasmuch as a pledge is given for the mutual service of both debtor and creditor, (of the debtor, that he may borrow more readily, and of the creditor, that repayment may be better secured), it will suffice, if the creditor shall appear to have used exact diligence in keeping the thing pledged; for if so, and the pledge be lost by mere accident, the creditor is secure, and is not prohibited from suing his debt.[1]

A verbal obligation is made by question and answer, when we stipulate that any thing shall be given or done; hence arise two actions, viz., the condictio certi, when the stipulation is certain; and the condictio ex stipulatu, when it is uncertain. This obligation is called a stipulation, because whatever was firm was termed stipulum by the ancients; probably from stipes, the trunk of a tree.[2]

Sometimes others bind themselves for the promissor. Such sureties are called fide-jussors, and are generally required by creditors for their greater security. Fide-jussors may be received in all obligations, whether contracted by the delivery of the thing itself, by words, by writing, or the mere consent of parties; nor is it material

[1] Book iii. t. 15. ss. 2–4. [2] Book iii. t. 16.

whether the obligation be civil or natural; for a man may intervene and oblige himself as a fide-jussor or surety, even on behalf of a slave; and this may be done whether the person who accepts the fide-jussor be a stranger or the master of the slave, when the thing due is a natural debt or obligation. A fide-jussor is not only bound himself, but by his death transmits the obligation to his heir. A fide-jussor may be accepted either before or after an obligation is entered into. Where there are fide-jussors, however numerous, each is bound for the whole debt; and the creditor may choose from whom he will demand it. But, by a rescript of the Emperor Adrian, a creditor may be obliged to demand separately from every fide-jussor who is solvent at the time of the suit, his share of the debt pro rata; and if any of the fide-jussors at the time of the suit are not solvent, the burden falls upon the rest. But, if a creditor obtain his whole demand from one of the fide-jussors, the whole loss shall be his, if the principal be insolvent, for such fide-jussor must blame himself, since, under the rescript of the Emperor Adrian, he might have prayed that no action should be given against him for more than his share of the debt, as surety.[1]

Obligations or contracts are made by consent, in buying, selling, letting, hiring, partnerships, and mandates. An obligation thus entered into is said to be contracted by consent; because neither writing, nor the presence of parties is absolutely requisite. The contract of buying and selling is perfected as soon as the price is agreed upon, although it be not paid, nor even an earnest given; for earnest does not constitute a contract, but serves only as proof of it.[2]

Locatio and conductio, i.e. letting and hiring, are nearly allied to emptio and venditio, i. e. buying and selling; and are governed by the same rules; for as the latter contract is completed when the price is agreed upon, so the former is contracted when the hire is once fixed by the parties. The locator, or person who lets, is entitled, if

[1] Book iii. t. 21, ss. 1–4. [2] Book iii. ts. 23, 24.

aggrieved, to an actio locati, and the conductor or hirer may have his actio conducti against the locator.[1]

Buying and selling, and letting and hiring, are so nearly connected that in some cases it has been difficult to distinguish the one from the other; as when lands have been demised for ever, upon condition that if a certain yearly rent be paid to the proprietor it shall not be in his power to take these lands from the tenant or his heirs, or from any other person to whom such tenant or his heirs shall have sold, or granted, or given them as a marriage portion or otherwise. But as this contract, concerning which the ancient lawyers had great doubts, was by some regarded as an emption and vendition, and by others as a location and conduction, the Zenonian law was enacted, which settled the proper nature of an emphyteusis, making it to be neither the one nor the other, but a contract supported by its own peculiar covenants; and ordaining that whatever is agreed upon by the parties shall take place as a contract.[2]

It is common for persons to enter either into a general partnership, or what the Greeks call a community of goods; or into a particular partnership, respecting some single species of commerce, as that of buying and selling slaves, oil, wine, or corn. If no express agreement be made by the partners concerning their shares of profit and loss, the loss and the profit must be equally divided. But if an express agreement be made it must be observed. A partnership lasts so long as the partners persevere in their consent so to continue; and if one of them renounce, the partnership is dissolved. A partnership is also dissolved by the death of one of the partners. Also when a man in partnership, being pressed by debts, makes a cession of his goods, and they are sold to satisfy either public or private demands, the partnership is dissolved.[3]

The twenty-eighth title of the book is—De Obligationibus quæ quasi ex Contractu Nascuntur.—When one person transacts the business of another, who is absent,

[1] Book iii. t. 25. [2] Book iii. t. 25. s. 3. [3] Book iii. t. 26. ss. 1, 4, 5, 8.

they reciprocally obtain a right to certain actions, called actiones negotiorum gestorum; i.e. on account of business done: and it is manifest that these can arise from no proper or regular contract; for they take place only when one man assumes the care of the affairs of another without a mandate; and they for whom business is transacted are thus bound without their knowledge; and this is permitted for the public good, because the business of persons absent in a foreign country, who have not intrusted their affairs to any particular person, would otherwise be totally neglected: for no man would take this care upon himself if he could not afterwards bring an action to recover what he had expended.[1]

The fourth book is—De Obligationibus, quæ ex Delicto Nascuntur.—These are of one kind only; for they all arise ex re, that is, from the crime or malfeasance itself, as from theft, robbery, damage, injury, furtum, rapina, damnum, injuria. Theft is the taking, using, or possessing any thing by fraud for the sake of gain. Robbery is the taking by force.[2]

The action for injurious damage is given by the law Aquilia; which enacts in the first chapter that if any man injuriously kills the slave, or the four-footed beast of another which may be reckoned among his cattle, he shall be condemned to pay the owner the greatest price which the slave or beast might have been sold for at any time within a year preceding. A man who kills another without proper authority is understood to kill him injuriously: but he is not subject to the law who kills a robber lying in wait, if there was no other way of avoiding the danger threatened. Nor is he liable under this law, who has killed another by accident, if no fault can be imputed to him. But the law holds a man equally liable for negligence or fraud. But if a man, by throwing a javelin for his diversion or exercise, happen to kill a slave who is passing, we must in this case make a distinction: for if the slave be killed by a soldier, while exercising in a place appointed for that purpose, the soldier is guilty of

[1] Book iii. t. 28. s. 1. [2] Book iv. t. i. s. 1.

no fault; but if any other person should accidentally kill a slave, by throwing a javelin, he is guilty; and even if a soldier should kill a slave accidentally by throwing a javelin in any other place than that appointed for soldiers to exercise in, he also is guilty of a fault, (i.e. culpable negligence.) If a man lopping a tree, chance to kill a slave who is passing, he is an offender if he worked near a public road, or in a way leading to a village without giving proper warning; but if he made due proclamation, and the other did not take care of himself, the lopper is exempt from fault: and he is equally so, although he did not make proclamation, if he worked apart from the high road, or in the middle of a field: for a stranger has no right of passage through such places. Also if a surgeon having performed an operation on a slave, should neglect or forsake the cure, by reason whereof the slave dies, he is guilty of culpable negligence. The want of professional skill is also regarded as culpable: as if a physician occasion the death of a slave by an unskilful incision, or a rash administration of medicine. If a mule-driver from want of skill, is unable to manage his mules, and a slave is run over by them, the mule-driver is in fault; and if he want strength to rein them in when another man is able to do it, he is then equally culpable: and the same may be said of a rider who, through want either of strength or skill, is not able to manage his horse.[1]

An injury may be done not only by beating and wounding, but also by slanderous language, by seizing the goods of a man, as if he were a debtor, when the person who seized them well knew that nothing was due to him; by writing a defamatory libel, poem, or history; or by maliciously causing another so to do; and by various other means too numerous to be specified. The punishment of an injury, by the Twelve Tables, was a return of the like injury if a limb was maimed; but if a blow only was given, or a single bone broken, then the punishment was pecuniary, the ancients living in great poverty. The prætors afterwards permitted the parties

[1] Book iv. t. iii. ss. 2-8.

injured to fix their damages at a certain sum, which might serve as a guide to the judge, but not preclude him from lessening the estimate at his discretion. It must be observed concerning every injury, that the party injured may sue either criminally or civilly. If civilly, the damage must be estimated, and the penalty awarded as we have before noticed: but if he sue criminally, it is the duty of the judge to inflict an extraordinary punishment upon the offender.[1]

An action is nothing more than the right of suing in a court of law for our just demands, jus persequendi in judicio quod sibi debetur. All actions, whatever be the subject-matter of them, whether determinable before judges or referees, may be divided into real and personal; for the plaintiff must sue the defendant, either because the defendant is obliged to him by contract, or has been guilty of some wrong; and, in this case, the action must be personal, in which the plaintiff alleges that his adversary is bound to give or to do something for his benefit; or some other matter, as the occasion requires; or otherwise, the plaintiff must sue the defendant on account of some corporeal thing when there is no obligation; in which case the action must be real; as, for example, if a man possess land which Titius affirms to be his property, the other denying it, Titius must bring a real action for the recovery.[2]

Actions are also farther divided into those which are given to recover the specific thing in dispute; those which are given for the penalty only; and mixed actions.[3]

Interdicts were certain forms of words, by which the prætor either commanded or prohibited something to be done; and were chiefly used when any contention arose concerning possession, or quasi possession. The first division of them is into prohibitory, restoratory, and exhibitory interdicts. Prohibitory are those by which the prætor forbids something to be done, as when he forbids force to be used against a lawful possessor; or against a person who is burying another, where he hath a right;

[1] Book iv. t. iv. ss. 1, 7, 10. [2] Book iv. t. vi. s. 1. [3] Book iv. t. vi. s. 16.

or when he forbids an edifice to be raised in a sacred place, or hinders a work from being erected in a public river, or on the banks, which may render it less navigable. The restoratory direct something to be restored, as the possession of goods to the universal successor, who has been kept out of possession by one who hath no right; or when the prætor commands possession to be restored to him who hath been forcibly ejected. And the exhibitory interdicts are those by which the prætor commands some exhibit to be made, as of a slave, for example, concerning whose liberty a cause is depending; or of a freed-man, from whom a patron would exact the service due to him; or of children to their parent, under whose power they are.[1]

6. Such is the analysis of the Institutes. The work may be regarded as an abstract of the legal part of the Stoic philosophy developed in the Roman law. Stoicism was equally manifested in the Roman politics. At Rome Stoicism remained popular in its most striking features—in its energy, and in its contempt of pleasure and of death. All the great political characters of Republican Rome were Stoics. And from the first to the last Stoic philosopher—from Antisthenes to Epictetus—manly independence is the characteristic of the school. The principle of internal liberty sufficient in itself for happiness, conducted Stoicism to the separation of the man from the citizen, and to his enfranchisement from the state. The stranger, the barbarian, the slave might be a man: the citizen might not. The wise man who alone is king, alone is citizen. The other Stoic principle conducted to the same consequences. The principle of the unity of the human race rested on another still more general—the universal order and harmony of the universe. There is, says the Emperor Marcus Aurelius, but one God, one world, one law, one truth. The study of politics at Rome ceased with Cicero. The Stoic philosophy of the Empire was only a philosophy of independence and resistance. Later it animated two of the

[1] Book iv. t. xv. s. 1.

greatest emperors. But driven from politics, the logic of the Stoics was used as the most trenchant weapon of the Roman Law. Cicero first applied philosophy to law. He was the first who combined the two characters of a practising barrister and of a jurist who studied the Science of Right. The great jurisconsults of Rome, Gaius, Paul, Papinian, Ulpian, were all educated in the school of Stoicism. And they introduced into law the maxims which had been hitherto buried in the books of philosophers. The strict law of ancient Rome, and the privileges of the Roman citizens based upon immemorial injustice, were incompatible with the maxims of justice, that every man was to live honestly, to injure no one, and to render to every one his own. But whilst equality of rights was extended to all, and the name of a Roman citizen became allied with the doctrines of equity and equality and lost the idea of privilege, absolute power triumphed. The pleasure of the prince has the force of law, says Ulpian. And this maxim, prominently advocated in the Institutes, was taught for centuries to all the young men who entered the Civil Service of the Empire. Ancient Greece and Republican Rome rested on the two principles of political liberty and civil slavery. The jurisconsults of the Roman Empire reversed both these doctrines. For political liberty they substituted absolute power: to civil slavery they opposed the natural equality of all men.

7. Notwithstanding that in the feudal monarchies the authority of the civil law was greatly lessened, and in some places annihilated, the systems of the civil jurists to this day survive in many of the most important portions of our Jurisprudence. During the greater part of three centuries Britain was a Roman province; from the year 82, when Agricola reduced the Britons to subjection, down to the year 403, when the Roman legions were finally withdrawn to assist Honorius against the Goths under Alaric. During this time the judicial tribunals of Roman Britain was fashioned upon the Roman models. And the corporations invented by the Roman jurists

were unquestionably the origin of the municipal institutions by which England in every age has been distinguished. Papinian, the celebrated Roman jurist under Septimus Severus, presided in the forum of Eboracum, York. Ulpian and Paulus also are considered by Selden to have exercised the functions of prætors in the tribunals of Roman Britain. But the invasion of the Anglo-Saxons swept away the monuments of Roman genius and civilization.

After the Norman conquest the study of the Civil Law was first prominently introduced into England in the reign of Stephen. Archbishop Theobald, the immediate predecessor and instructor of the celebrated Chancellor and Archbishop Thomas-a-Becket, brought Vacarius, an Italian priest, to England, A.D. 1143. Vacarius first brought the Pandects into England, and shortly afterwards, A.D. 1149, established a school of Civil Law at Oxford. There he taught with the greatest success; and the school so founded has continued to the present day. Soon after the establishment of this school different learned persons compiled treatises on the Laws of England. And to this school, perhaps, may be attributed the origin of that scientific system of Jurisprudence which arose, as Sir William Blackstone has remarked, in the interval between the reigns of Henry II. and Edward I. In the reign of Henry II. was published the treatise compiled under the direction of Glanville, who was, in 1189, *capitalis justiciarius totius Angliæ.* In the reign of Henry III., Bracton, Doctor of Civil Law, who also was one of the King's Justices Itinerant in 1244, collected, though not professedly by authority, the laws and customs then prevailing in England. Bracton introduced many of the terms of the Roman into the English Law. Thus the celebrated "latitat" derived its name from the perpetual edict, "Qui fraudationis causâ latitaverit." In the reign of Edward I., from whose time, according to Lord Chief Justice Hale, the whole scheme of English Law may date its existence, many treatises appeared.

Fleta,—seu Commentarius Juris Anglicani—was written about the year 1285, the thirteenth of the reign of Edward I. Breton, written in the same reign, is merely an abridgment of Bracton's work interspersed with new matter. Ranulph de Higham and Gilbert de Thornton, both Chief Justices, also wrote in the same reign. The summary of the latter is an abridgment of Bracton. Most of these writers from Glanville downwards have not only adopted much of the style and matter of Justinian, but also appear to have been much struck with his Proemium, which they invariably copy.

Justinian says: "Imperatoriam majestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus, et bellorum et pacis recte possit gubernari; et Princeps Romanus non solum in hostilibus prœliis victor existat, sed etiam per legitimos tramites calumniantium iniquitates expellat; et fiat tam juris religiossisimus, quam victis hostibus, triumphator magnificus."

So Glanville says: "Regiam Potestatem non solum armis contra rebelles et gentes sibi regnoque insurgentes, oportet esse decoratam, sed et legibus ad subditos et populos pacificè regendos decet esse ornatam; ut utraque tempora, pacis et belli, gloriosus rex noster ita feliciter transigat, ut effrænatorum et indomitorum, dextra fortitudinis, elidendo superbiam, et humilium et mansuetorum, æquitatis virgâ, moderando justitiam, tam in hostibus debellandis semper victoriosus existat, quam in subditis tractandis æqualis jugiter appareat."

Bracton, too, says: "In rege qui recte regit, necessaria sunt duo hæc, arma videlicet et leges quibus utrumque tempus bellorum et pacis, rectè possit gubernari; utrumque enim istorum alterius indiget auxilio, quo tam res militaris possit esse in tuto, quam ipsæ leges usa armorum et præsidio possint esse servatæ, si autem arma defecerint contra hostes rebelles et indomitos, sic erit regnum indefensum; si autem leges, sic externimabitur justitia, nec erit qui justam faciat judicium."

So Fleta says: "Regiam Potestatem non solum armis

contra rebelles et gentes sibi regnoque insurgentes oportet esse decoratam sed legibus ad subditos populosque pacificos regendos decenter ornatam esse."

Glanville, though in stating the principles which govern the important subject of contracts, he has evidently borrowed from the Institutes of Justinian, avoids all notice of the sources whence they were obtained. Bracton, in his treatise De Legibus et Consuetudinibus Angliæ, introduces from the Institutes of Justinian the leading principles of justice—"Justitia est constans et perpetua voluntas jus suum cuique tribuere," and numerous other Roman maxims. He also adopts the title and method of the Institutes. He uses the term Prætor to designate a Common Law Judge, and distinguishes between the jus civile and jus prætorium. He also, in numerous instances, expressly quotes the Institutes, the Digest, and the Code. In fact, Sir William Jones has said, "When I rely on the authority of Bracton I am perfectly aware that he copied Justinian almost verbatim."

In the same reign was published a treatise called the Mirror of Justices. Mr. Blaxland has noticed as a curious coincidence, that most of the Germanic nations have their Mirror of Justice. In Germany, about the year 1220, appeared the Speculum Saxonium, or Sach Senspiegel. In France, about 1280, Guillaume Durant published his Speculum Justitiæ. Of the same period, or a little later, in England, is the Miroir des Justices. And this latter book is supposed to have been formed by Andrew Horne on the basis of an older law tract called the Speculum Justitiariorum, said to have been written in the time of the Saxons.[1]

We must now consider the reasons which led to the separation of the English Common Law in terms from the Roman system. Glanville, Bracton, and the other fathers of English legal history had quoted largely from the Roman books of authority; and even laid down that

[1] Blaxland's Codex Legum Anglicarum; or a Digest of the Principles of English Law, arranged in the order of the Code Napoleon (London: Shuttleworth, 1839), p. 98.

where an express rule was wanting in our law, recourse might be had to the rule of the Civil Law. So in the reports of cases decided during the reigns of Edward I. and Edward II. the rules of the Imperial Law are quoted and relied upon as good authority. Edward I. openly encouraged the study of the Civil Law, and invited to England Franciscus, son of the celebrated Accursius, to lecture at Oxford. But a jealousy speedily arose between the Common Lawyers and those who cultivated the Civil and Canon Laws. The Norman ecclesiastics were always regarded with dislike by the native nobles and clergy. The Civil Law unquestionably did not contain those principles of a just organization of judicial tribunals —namely, vivâ voce evidence and trial by jury, the peculiar characteristics of the English Common Law system; whilst the political portion of the Roman Law, as exemplified in the Lex Regia, left no independence to the feudal nobles or liberty to the subject. I quote this passage again: Quod principi placet, legis habet vigorem; ut-pote cum lege regia, quæ de imperio ejus lata est, populus in eum omne suum imperium et potestatem conferat—What pleases the prince has the force of law; inasmuch as by the Royal Law, which was passed concerning his authority, the people conferred upon him all their power and authority.[1] Passages such as these if incorporated with the laws of England would soon have destroyed that feudal liberty which the nobles cherished. And once the Roman Law was understood in its political portion and as regarded the public law of the empire to be founded upon the most arbitrary principles, it ceased to be cultivated professedly as the Roman law. Though with respect to property and the rights of private persons the opinions and decisions of the Roman lawyers do not seem in any degree to have been perverted by the nature of their government.

From the time of Stephen the English nation was divided into two parties. The clergy, who, from the Norman Conquest, had engrossed the learning of the age, were

[1] Digest, lib. i. tit. 4.

particularly distinguished by their knowledge of law—Nullus clericus nisi causidicus, says William of Malmesbury. Even before the Conquest the judges had been selected from the clergy, and all the inferior offices of the law were filled by the lower orders of the clergy—a fact which has occasioned their successors to be denominated *clerks*, i.e., clerics. The bishops and clergy applied themselves wholly to the study of the Civil and Canon Laws. The nobility and laity adhered with equal pertinacity to the old Common Law. After the reign of Edward II. the Civil Law ceased to be quoted in the Common Law courts, and the lawyers did not hesitate to boast of their ignorance of it. Thus in the Abbot of Torum's case[1] Sergeant Skipwith declares a title in the Civil Law to be devoid of meaning—in ceux parolx, contra inhibitionem novi operis, ny ad pas entendment. And in a more remarkable case at the Parliament of Merton, 20 Henry III., when the prelates endeavoured to procure an Act to declare all bastards legitimate in case the parents intermarried at any time afterwards, because the Canon Law had adopted this doctrine from the Civil Law, all the earls and barons, says the Parliament Roll, with one voice answered—Nolumus leges Angliæ mutari. The same jealousy prevailed above a century afterwards, when the nobility declared, "that the realm of England hath never been unto this hour, neither by the consent of our lord the king and the lords of parliament shall it ever be ruled or governed by the Civil Law." This with other reasons led to the withdrawal of the clergy from the temporal courts. Early in the reign of Henry III. episcopal constitutions were published, forbidding all ecclesiastics to appear as advocates in foro sæculari. The Civil Law now permanently retired to the universities and the ecclesiastical courts.

The great event which gave a place to the common lawyers to unite and develop their system was the fixing, at Westminster, of the Court of Common Pleas, the grand tribunal for disputes of property. Formerly this

[1] Mich. 22 Ed. III. 24.

court was held, like all the other superior courts, before the King's Chief Justiciary in the aula regis, or such of his palaces wherein he resided, and removed with his household from one end of the kingdom to the other. To remedy the consequent inconvenience to suitors, the eleventh chapter of Magna Charta enacted, that Common Pleas should no longer follow the king's court, but be held in some certain place. This place was fixed in the Palace of Westminster, now for centuries the principal seat for the administration of justice in England. The professors of the Common Law, then first brought together at Westminster, and excluded from studying their own science at Oxford and Cambridge, formed themselves into a society, purchased houses called the hostels, hotels, or inns of Court and Chancery, and raised a legal university. Here exercises were performed, lectures read, and degrees were at length conferred in the Common Law, as at other universities in the Canon and Civil. The degrees were those of barristers, first called apprentices, from apprendre, to learn, which degree of barrister or apprentice answered to the bachelor's degree conferred at the universities, as the state and degree of a sergeant—serviens ad legem—did to that of doctor.

Notwithstanding this formal denunciation of the Civil Law, many portions of the Civil Law have been incorporated into the laws of England and Ireland; and the law of Scotland is more immediately founded upon the Roman procedure. The study of these portions is directly practical for the education of an English lawyer. From the Civil Law has been derived much of the doctrine and practice of Equity; and the Civil jurists have constantly been cited by the most eminent English Chancellors. At Law and in Equity the great names of Lord Chief Justice Hale, Lord Chief Justice Holt, Lord Hardwicke, Lord Mansfield, Lord Stowell, Sir William Grant, and Lord Brougham, show that the knowledge of the Civil Law is an aid to the cultivation of the most powerful intellect, to the formation of the soundest legal mind.

Uses were directly borrowed from the fidei commissa

of the Civil Law, although it is true that in their introduction, the ecclesiastical chancellors extended the Roman principles. During the latter years of the Roman Republic, various prohibitory laws existed as regarded successions and legacies. Among them, in particular, was the Voconian law, U.C. 584, which precluded the appointment of a female, even an only child, as heir. Vinnius shows that exiles and unmarried persons also were incapable even of taking a legacy under the testament of a Roman citizen. A practice, therefore, arose of constituting by will a qualified citizen as heir, or universal devisee and executor, with a precatory request that he would give the inheritance, or part of it, to the intended legatee or devisee, who could not take it by direct appointment. Quibus enim non poterunt hereditatem vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant.[1] This was called a fidei commissum, of which the form has been preserved in the Institutes. The person thus constituted heir was called hæres fiduciarius; and the person to whom the testator directed the inheritance to be given was called hæres fidei commissarius. Before the time of Augustus, such trusts were left to the honour of the person so selected. But Augustus, moved by the solicitations of individuals, and by some gross breaches of confidence that had occurred, first ordered the Consuls to compel the performance of such trusts as fidei commissa. Next, he created a Prætor at Rome, to whom was given the jurisdiction over them. The Emperor Augustus thus gave a legal sanction to the violation of existing laws, without repealing them. However, this plan ultimately had the most singular effect upon the English legal system, giving origin to the distinction between legal and equitable estates. Thus, a person at one side of Westminster hall is the owner, at the other a trespasser. The Emperor Justinian completed the system introduced by Augustus, and extended the rights of the hæres fidei commissarius by a law

[1] Just. Inst. ii. 23. 1.

which enacted, that if a testator should direct the person whom he constituted his heir to give either the whole or a part of the inheritance to another, and if this circumstance could not be proved either by the written will of the testator, or the testimony of five witnesses, in case the person constituted heir should refuse to comply with the intention of the testator, he was compellable either to make a solemn oath that the testator had not created a fidei commissum, or else to execute the trust reposed in him. Thus, the right of the person having the beneficial interest—cestui que use, which was originally only jus precarium, one for which the remedy was only by entreaty or request, became jus fiduciarium, entitled to a remedy from a court of justice. The history of the introduction of uses into England is well known. They were originally employed to evade the statutes of Mortmain. Corporations, and especially the ecclesiastical corporations, were by the policy of the law prohibited from the purchase of land, unless a licence in Mortmain were previously obtained. The Mortmain statutes were constantly evaded by different expedients, one of which was to obtain grants, not to the religious houses directly, but to some person to hold to the use of the religious houses. Now, the principle of the feudal tenure was to look no further than the actual and ostensible tenant, and to consider him alone as proprietor. In the Courts of Common Law the use was a nonenity, and so it escaped the statutes of Mortmain. But the Chancellors, who were then almost invariably ecclesiastics, acting on the principles of the Roman law, maintained that these gifts were binding on the conscience, and ought to be like the fidei commissa. As regarded the religious corporations, this contrivance of uses was of little avail; for immediately there passed a statute, 15 Ric. II. c. 5., which enacted that, for the future, uses should be subject to the statutes of Mortmain, and forfeitable like the lands themselves, unless the licence of the Crown were duly obtained. But the uses continued. It soon, however, appeared that the assumed jurisdiction of Chancery

was not sufficient; for whenever a positive declaration of a use could not be proved, the Court of Chancery could not compel the feoffees to uses to execute them, there being no legal proof that they held the land for the use of any other person. To remedy this evil, the precedent of the Emperor Justinian's reform of the system of procedure in respect to the fidei commissa was exactly followed. John Waltham, Bishop of Salisbury, and Chancellor to King Richard II., took advantage of the privilege given him by the Statute of Westminster, 2. (13 Edw. I. c. 13.), of inventing new writs, and invented a new writ of subpœna, returnable, into the Court of Chancery only, to compel the appearance of a defendant, and to oblige him to answer upon oath the allegations of the plaintiff, contrary to one of the first principles of the Common Law—that no man can be compelled to charge himself—nemo tenetur prodere seipsum. Such has been the introduction of uses into the English Law. Blackstone has considered that this was the origin of the equitable jurisdiction of the Court of Chancery; and says, that this writ of subpœna, returnable into Chancery only, in order to make the feoffee to uses accountable to his cestui que use, was afterwards extended to other matters wholly determinable at Common Law. But Sir James Mackintosh has shown his inaccuracy; he says, in his life of Sir Thomas More, "It would seem that this device [of the subpœna] was not first employed as has been hitherto supposed, to enforce the observance of the duties of trustees who held lands, but for cases of an extremely different nature, where the failure of justice in the ordinary courts might ensue, not from any defect in the Common Law, but from the power of turbulent barons, who, in their acts of outrage and lawless violence, bade defiance to all ordinary jurisdiction." Sir James Mackintosh then proceeds to show that in the earliest cases in Chancery there are statements of the age and poverty of the complainants, and of the power, and even of the learning of the supposed wrongdoer, topics addressed to

compassion, or at most to equity in a very loose and popular sense of the word. It may be difficult to imagine how the clerical chancellors could have moulded into a regular form this very anomalous branch of Jurisprudence. But many of the ecclesiastical order, originally the lawyers, were eminently skilled in the Civil and Canon laws, which had attained an order and precision unknown to the digests of barbarous usages then attempted in Great Britain.

The English system of Common Law Pleading is directly derived from the technical system used in the more ancient Roman Law, whilst the system of Equity Pleading was derived from the method used under the Jus Prætorium. The ancient Roman Law was all stricti juris. The mode of procedure under the ancient Roman Law was by actio—the two principal classes of which were the actio in personam, and the actio in rem; to which was added the actio mixta. So in English Law Pleading, actions are real, personal, or mixed. In the actio in rem the actor—plaintiff sued the reus—defendant, for the recovery of some particular thing—for example, a landed estate, not in respect of any contract, but because the actor claimed the better title. It was an action to try the right to the property. In the actio in personam the actor sued the reus in respect of some obligation arising either from a contract, ex contractu, or from a wrong, ex delicto. The analogy of our Law Pleading to this system will at once be traced by every student. This system was full of the most technical subtlety; and as in our Law Pleading, the slightest slip was fatal to the action. A modification was introduced in which the actor proceeded by formula. According to this method the actor obtained from the Prætor a precept which, together with the subsequent pleadings, were delivered to the Judge who afterwards tried the cause. Similarly in England original writs were sued out from the office of Chancery. In proceedings by formula it was originally necessary to state the cause of action by some name recognised by the law, as empti, venditi, locationis. However,

as many cases were without the strict letter of the law, the intentio of the formula was allowed to be so framed as to state the facts in a form settled by a Jurisconsult. Hence arose the distinction between actiones præscriptis verbis, and actiones in factum. In the English system the word actor has not been retained. It has been translated into the word plaintiff, derived from the proceeding by plaint in the Saxon County Courts. The word defendant has been taken from the commencement of a plea in an action at law. "And the said C. D. comes and defends the wrong and injury."—the word defend—as defendere in Latin—meaning in old English to deny. When the reus,—defendant, merely denied the plaintiff's case, no form of pleading was necessary. But when he relied on distinct matters of defence these were stated in the exceptio, plea. Exceptiones were either dilatoriæ, dilatory—such as went to defer the action, or to dispute the plaintiff's capacity to sue—similar to our Pleas in Abatement; or they were peremptoriæ, peremptory, denying the right of action, similar to our Pleas in Bar. The exceptio might, primâ facie, bar the plaintiff's right; but he might be able to state some new fact avoiding the primâ facie bar. This was done by the replicatio—replication. To this the defendant might similarly answer by a duplicatio,—rejoinder. And this again might be answered by the plaintiff's triplicatio—surrejoinder. In this way the parties proceeded as in the English system of Law Pleading until they came to a direct contradiction whether of law or fact. When this was accomplished the litis contestatio was said to ensue; the parties were at issue, ad exitum, at the end of the pleadings. Ultimately the whole of this technical system was abolished by the Emperor Constantius, A.D. 352; and all causes were heard before the Prætor according to the system in his court. I have given the above sketch of the Civil Law in England as an illustration. But the Roman Law has had a similar effect upon the development of every legal system in every nation of Europe.

END OF BOOK II.

BOOK III.

THE CULTIVATION OF CIVIL LAW AND OF JURISPRUDENCE UPON THE REVIVAL OF LEARNING.

A.D. 1100–1600.

"Wenn ein wiſſenſchaftliches Gebiet, ſo wie das unſrige, durch die ununterbrochene Anſtrengung vieler Zeitalter angebaut worden iſt, ſo wird uns, die wir der Gegenwart angehören, der Genuß einer reichen Erbſchaft dargeboten. Es iſt nicht blos die Maſſe der gewonnenen Wahrheit, die uns zufällt; auch jede verſuchte Richtung der geiſtigen Kräfte, alle Beſtrebungen der Vorzeit, mögen ſie fruchtbar oder verfehlt ſeyn, kommen uns zu gut als Muſter oder Warnung, und ſo ſteht es in gewiſſem Sinn bey uns, mit der vereinigten Kraft vergangener Jahrhunderte zu arbeiten. Wollten wir nun dieſen natürlichen Vortheil unſrer Lage aus Trägheit oder Eigendünkel verſäumen, wollten wir es auch nur, in oberflächlichem Verfahren, dem Zufall überlaſſen, wie Viel aus jener reichen Erbſchaft bildend auf uns einwirken ſoll, dann würden wir die unſchätzbarſten Güter entbehren, die von dem Weſen wahrer Wiſſenſchaft unzertrennlich ſind: die Gemeinſchaftlichkeit wiſſenſchaftlicher Überzeugungen, und daneben den ſteten, lebendigen Fortſchritt, ohne welchen jene Gemeinſchaft in einen todten Buchſtaben übergehen könnte."

Savigny: System des heutigen Römischen Rechts, Vorrede, 1.

"A domain of science, like Law, cultivated by the unbroken continuity of many ages, is for the present time a rich inheritance. There is not merely the mass of truths accomplished; but the efforts of scientific minds, all the attempts of our predecessors, whether they have been fruitful or failures, are either guides or warnings; and thus we are enabled to labour with the united strength of the ages that are past. Were we through indifference or presumption to neglect this natural advantage of our position, and to abandon to chance the influence which it ought to exercise over us, then should we throw away an inestimable advantage, the indissoluble substance of true science, the community of scientific convictions, and the living progress without which that community would degenerate into a dead letter."

Savigny: History of the Modern Roman Law, Preface, 1.

BOOK III.

THE CULTIVATION OF CIVIL LAW AND OF JURISPRUDENCE UPON THE REVIVAL OF LEARNING.

A.D. 1100–1600.

CHAPTER I.

1. THE ITALIAN SCHOOLS OF CIVIL LAW.

A.D. 1100–1500.

The last conspicuous form of ancient philosophy was that which it assumed at Alexandria. The city chosen by the pupil of Aristotle to bear his name, and to rise to scientific, commercial, and political importance over others, even as its founder overcame empires, became the scene of great thinkers and mighty schools. Plotinus resuscitated Plato; Proclus gave the world another Aristotle. The spirit and tendency of their speculations, however, render it unnecessary to make more than a passing allusion to them. The closing of the Athenian Schools by Justinian, and the death of Boëthius may be considered the last events in ancient philosophy. Nothing can be more unfounded than to suppose because Boëthius is usually styled the last of ancient philosophers, and Descartes the first of modern, that, therefore, from the sixth to the seventeenth centuries, there had been no philosophical activity. We have too much disregarded the philosophy of the so-called dark ages. It is usually the least explored, but by no means the least instructive period of European history, as it has been traced in the disquisitions of Montesquieu, Ranke, Hurter, Voight, Hallam, and other philosophical inquirers. The feudal and legal systems of Europe arose. Independently of mere abstract investigations on mind, and of the principles of doctrinal theology, all the most important laws and institutions of European society were dug out of the mine of that ponderous and inexhaustible

mass of human speculation. There, even more than among the ancients, may be found the well-springs of our modern speculative doctrines and controversies. In fact, no age in the world's history was more productive of great men. It was the age of William the Norman, of the well-taught Lanfranc, of Abelard, and Bernard of Clairvaux, of the learned Mussulmans of Spain, of Roger Bacon, of Albertus Magnus, of St. Thomas Aquinas, of Duns Scotus, of Alexander Hales, of Occam, and of Bradwardinus, of Thomas the Rhymer and Marco Polo, of Sir William Wallace and Edward the First. It was the age of rising cities, of consolidated feudalism, of literature beginning to breathe, of liberty struggling to be born. It is a universal law of nature that a new organization shall always be preceded by the entire dissolution of what has gone before. The mineral will crystallize anew only after it has been completely dissolved. The vegetable and the animal must be decomposed before their elements can recombine into other forms of life. So, too, a new society can arise only when the old one has been wholly dissolved, its atoms freed from each other, and its old arrangements broken up, that every particle may be at liberty to become part of the new living frame, according to some other law than that which governed the formation of the old social unit. The Roman world had to be ground down and dissolved by barbarian and Christian influences before the formation of modern society became possible. When the decomposing process was completed society may be said to have ceased, whilst each family and individual, passing also through a modified chaos, acquired new ideas, and tended to new organizations. To use the language of electrology, each atom then acquired a new polarization. Then the Church set about the task of reorganizing a body of knowledge, of pouring her vivifying and purifying light through all the powers and capacities of thought which were slumbering in the minds of men, so as to arouse them to exercise themselves in the various pursuits of arts and sciences. Phi-

losophy meditated on the deep truths of religion, and endeavoured to arrange them in logical order and sequence. An acute and penetrating logic, like the flaming sword of Paradise, turned every way to guard the sanctuary of religious truth.

Upon the fall of the Roman empire, the study of the civil law was abandoned, an age of darkness for a time covered Europe with a cloud. Upon the revival of learning in Europe, the term Jurisprudence was not used to designate that department of mental science which treats of the rules of universal justice. In its primary sense, the word Jurisprudence was used to denote the knowledge of the Roman Law. The science of Law in Europe dates from the twelfth century. It was then associated with theology and scholasticism. Irnerius was the contemporary of Abelard. During four centuries from the year 1100 the Civil Law was zealously cultivated in Italy; and simultaneously the Feudal and Canon Laws acquired a systematic form. The Feudal system obtained complete dominion over the tenures of land. The Canon Law regulated the ecclesiastical relations of the States of Europe; and having been originally but the rule of the Christian Church, it acquired the stability and authority of Positive Law under Gregory VII., in the thirteenth century.

The first professors of the Civil Law appeared in the Italian cities. Irnerius,—Werner, by universal testimony, was the founder of all learned investigation into the Laws of Justinian. He gave lectures at Bologna soon after the commencement of the twelfth century. The freedom of the Italian Republics rendered the profession of the Law honourable; and the Doctors of the Law were frequently called to the office of Podesta, or Criminal Judge. Irnerius commenced the custom of making glossaries, which long continued to be the only attempts at legal literature. A gloss properly meant a word from a foreign language, or any difficult word which required interpretation. It was afterwards used for the interpretation itself. The first glosses were interlinear; they

were afterwards placed in the margin, and were finally extended to a sort of running commentary on the entire book. An example of this latter kind of glossary is the commentary of Coke upon Littleton's Tenures. Thus Italy, the cradle of the Roman Law, was also the theatre of its renovation. The prosperity of the Lombard cities, and their love of independence, gave to civil and political life new events and new activity. The old laws of the barbarians could not satisfy the novel principles which struggled for development, and the study of the learned was directed to the Roman Law. During the space of a century from the time that Irnerius commenced the system of glossaries, each glossator wrote much to show his independence and genius ; the glosses had multiplied into a huge and inconsistent bulk, and a digest was required. This work was accomplished by Accursius the Florentine. Accursius was born in 1182, and died in 1260. The best edition of his works is that of Denis Godefroi, Lyons, 1589, 6 vols. fol. The digest of Accursius—Corpus Juris Glossatum—is described by Eichhorn as remarkable as well for its barbarous style and gross mistakes in history, as for the solidity of its judgments and practical distinctions. Savigny, however, speaks but slightingly of this laborious compilation. To these succeeded Bartolus (born 1302, died 1359). He appears at the head of the scholastic jurists. The fame of the schoolmen excited the emulation of the lawyers to use the dialectic method. Thus, during three centuries spent in the study of the Roman Law the science of Law had not yet passed out of a trivial exegesis, which employed in its service neither history nor literature. And this school of jurists, feebly cultivating only the Civil Law lingered to the close of the fifteenth century.

Next after the attempts of the Italian civilians in the Middle Ages, some of the first essays upon Jurisprudence were directed to the consideration of International Law. The Law of Nations was unknown as a science to the ancients. The Jus Feciale amongst the Romans could

have been of but little importance, since not the faintest trace of its doctrines has survived to modern times. Their Jus Gentium was what we term Natural Law. Thus Ulpian says :—Jus gentium est quo gentes humanæ utuntur; quod a naturali recedere facile intelligere licet; quia illud omnibus animalibus, hoc solis hominibus inter se commune est. Nor had Tribonian, or the other jurists who compiled the Institutes and Digest from the writings of the classical jurisconsults of Rome, any other idea of the Law of Nations than that comprised in Ulpian's definition. As the revival of Western civilization arose in the commercial republics upon the coast of the Mediterranean, accordingly the first rules of International Law appear in the customs of Venice, Genoa, Marseilles, Barcelona, and the other trading republics of the Middle Ages during their mutual wars. Machiavelli, a citizen of Florence, early in the sixteenth century, wrote systematic political treatises. Vasquez and Suarez, the learned Spanish Jesuits, wrote on Jurisprudence. And these are among the first eminent authors in modern history treating of the science of Law. For from the sixth to the fifteenth century, both inclusive, not a single writer of any note either upon General Jurisprudence or the Law of Nations appears.

There is a great distinction to be observed between the methods of Melancthon, Oldendorp, and other early writers on Natural Law, and the systems of Grotius and his followers. The authors [1] who precede Grotius understand Natural Law as a special science, but in intimate union with the dogmas and precepts of the Christian religion. Natural Law is derived from human nature ; but as this nature has been perverted by original sin, and as reason has been obscured, this science requires the aid of Theology, and Reason must be strengthened by Revelation. There is thus a double state of man, before and after the Fall. Hence, there is a two-fold

[1] Melancthon, "Epitome Philosophiæ Moralis," 1538; Oldendorp, "Elementaris introductio juris naturæ, civilis, et gentium," 1539; Hemming, "De Lege Naturæ," 1562; Gentilis, "De Jure Belli et de Legationibus;" Winkler, "Principiorum Juris libri v." 1615.

natural law—that of the first state of integrity in which Natural Law is blended with Religion and Morality, and in which the institutions rendered necessary by the Fall do not yet exist, such as property, social inequalities, contracts,—and that of the latter state in which there remains only a portion of primitive law to protect which the positive laws exist. But, after Grotius, Natural Law was understood as a science independent of Positive Religion.

In 1539, Oldendorp,[1] afterwards professor at Marburg, published a work, which may be considered as the first system of Natural Law. The title is, Isagoge, seu elementaria introductio Juris Naturæ, Gentium, et Civilis. Oldendorp perceived the distinction between the Jus Gentium and the Jus Naturæ ; but he had no accurate idea on the subject.

2. Ulric Zazius,[2] a professor at Friburg, and Garcia d'Erzilla, who flourished 1515, according to Andrès, have the merit of extricating the Roman Law from the glossators and scholastics. Alciati, of Milan, however, has more generally the reputation of the introduction of a better system. He taught, from 1518 to 1550 in the universities of Avignon, Milan, Bourges, Paris and Bologna. Alciati has had the merit of being the first modern jurist to write with purity and elegance. And the French school of jurists, so founded, has produced Cujas, L'Hopital, Godefroi, Domat, D'Aguesseau, and Pothier.

French Jurisprudence commenced in practice, and its first monuments were Laws. In the last year of the eleventh century the usages and customs of France were collected under the name of The Assizes of Jerusalem, Many brief compilations of the French Law were made during the ensuing three centuries. Under Charles VII., Louis XI., and Charles VIII., Laws were consolidated, the numbers of local customs reduced; and this labour

[1] Oldendorp: b. 1506, d. 1557. Izagoge: Antwerp: Goinus: 1539: De Copiâ verlorum et rerum in jure civili: Lugduni: 1543.

[2] Udalrici Zazii opera omnia: Lugduni: 6 vols. fol. 1550.

continued during the sixteenth century. Thus practice everywhere prevailed. Jurists only wrote as to the daily application of the law. Italy brought into France the cultivation of the theoretical science of law. Alciatus,[1] after having been a professor whilst very young at Avignon, came to Bourges on the invitation of Francis I., and founded a new school of law.

Fifteen years after the arrival of Alciatus at Bourges, Cujas[2] opened at Toulouse a course of lectures on the Institutes, and rapidly assembled together a number of illustrious disciples. After some years of a free professorship he demanded from his native city a Chair of Law. But Toulouse had not felt the revolution which Alciatus had accomplished at Bourges in Jurisprudence. The school of Bartolus reigned there without a rival, whilst Cujas, inspired by his own genius, as well as by the example and the works of Alciatus, studied the texts and explained the Institutes of Justinian with the assistance of literature and philosophy. Afterwards he lectured on law at Bourges, at Paris, and at Turin; then he returned to Bourges, where he died. The historical labours of Cujas were important. Before his time jurists regarded the body of the Roman Civil Law as a code of laws and homogeneous legislation which it was necessary to study as time had made it; it never entered into their minds to decompose so complicated a machine into its constituent parts. But Cujas attempted this. Tribonian had confounded the principles of science, the history of antiquities, the philosophy of the juris-consult; and corrupted the purity of the Roman traditions with the pretentious barbarism of Byzantium. But Cujas understood that each jurist, the dispersed fragments of whose works Justinian presents to us, represents a system, and that it was impossible to seek for unity in a compilation which subsisted only by a union of contradictory elements. Cujas then endeavoured to recompose the Roman Law,

[1] Alciatus, b. 1492, d. 1550. Alciati opera omnia: Basileæ, 4 vols. fol. 1558.

[2] Cujas, b. at Toulouse, 1522, d. at Bourges, 1590. Cujacii opera: Frankfort, fol. 1595.

by attaching to each jurist his own part. Hence he annotated Ulpian and Paulus, and restored Papinian. Cujas is the true founder of the historical school of law. Towards the last period of his professorship Cujas pronounced in his school a discourse on the method of teaching law.[1] By this it is easy to see how much he was deficient in method and rational criticism, and in that power which generalizes ideas; he finds scarcely any thing to say, except that the professor should be always nominated by the authorities. He displays an elegant latinity, gives numerous quotations from Euripides and Aristotle, but has scarcely a universal conception or a philosophical thought on the science of law.

Doneau[2] taught a contrary doctrine to that of Cujas. With him law was a sort of geometrical system and method of deciding all civil and political affairs. Thus he wrote only treatises, whilst Cujas only wrote commentaries. Doneau, whilst studying the Roman Law, isolated himself from the Roman jurists and their fragmentary works, and composed true, dogmatical treatises upon each considerable portion of the Civil Law. Cujas, in a brilliant style followed antiquity and the ancient jurists. Doneau, a profound thinker and an indefatigable logician, lays down principles and deduces consequences. He is the model of the dogmatical method applied to texts. Thus these two jurists had a cordial antipathy for one another. But time has associated them in the history of law. Now, in France, Doneau is almost entirely unknown. In Germany he is reprinted, admired, and studied.

In the sixteenth century the French Law received the same impulse in its study and development which the Roman Law had already received. Dumoulin,[3] advocate at the parliament of Paris, was no less indefatigable in study than ardent in dispute. He mingled law with business, and brought Jurisprudence into the discussions of the age. Exiled from France, he went from court to

[1] Vol. viii. Edn. Naples, p. 1172. [2] Hugues Doneau, b. 1527, d. 1591.
[3] Dumoulin, b. 1500, d. 1566.

court, and from university to university; he taught law successively at Basle, Geneva, Strasbourg, and many other places. The weakness of his health prevented him from pleading in public; but he was constantly consulted in chamber, and was one of the most learned men that appeared in the early history of the French Bar. Whilst the school of Civil Law at Bourges cultivated the historical study of the Roman Law, the French Law, scattered in the customs of the different provinces, received at last some stability from Dumoulin. By his Commentary on the Customs of Paris he established the principal rules of French Law and prepared the way for the labours of Pothier. This period has been termed the golden age of French Jurisprudence. Montesquieu says the Roman Law was then the object of the study of all who were destined for civil employments. Persons, then, did not make a boast of being ignorant of what they ought to know, and of knowing what they ought to be ignorant of. Lerminier considers the French Bar in the sixteenth century to have been at its height of development. In the following century the language was purified, but learning was deteriorated. The eighteenth century had oratorical talents, but little study or labour. It was in the sixteenth century that the French Bar displayed its most vivid energy beside the school from which it proceeded.

The science of law required to be translated into legislation by a powerful, learned, and good man. L'Hopital[1] was a practical and reforming minister of France. He did his best to accomplish the amendment of the law of judicial procedure, and to unite and calm the great French political parties. Amongst the fierce passions of the times some persons at last perceived that liberty of conscience ought to be respected. This truth is plain for us. It was novel in the sixteenth century. One of the first who conceived its principles and applied them was the Chancellor L'Hopital. In 1570 he composed his treatise on the end of war and peace, in which he ex-

[1] L'Hopital, b. 1505, d. 1573. Œuvres inedites, Paris, Boulland, 1826.

pressed with eloquence the ideas of union and reconciliation of which he is the representative at this epoch. The end of war, he says, is peace. But how is peace to be obtained? Is it by compromise, or by full and complete victory? He shows that this complete victory cannot be hoped for; that insurgents, who fight for their personal defence, will yield only to extermination; that they are still very powerful and numerous; that the prolongation of war can only fill France with destruction and massacre; that prolonged civil war produced contempt for the authority of the king; that already many of the lords openly violated the oath of fidelity which they had taken; if, then, victory were impossible, or at least very difficult; if it could be obtained only by a war of extermination, which would introduce barbarism in manners, disorder in laws, and rebellion everywhere, what remained if not to obtain peace by a compromise. But it was said on the other side the king is ordered to do justly, and to punish by the sword those who with the sword have unjustly raised themselves to trouble his state. Rebels, as they are, it is necessary to cut off these corrupted members. To this violent policy L'Hopital opposes the argument of humanity. As medicine tends to cure, so does justice tend to the glory of God, not to cruelty. It is true it is necessary to cut off a corrupted member, but only when there is no hope of cure. Without siding with the rebellion, L'Hopital excuses the rebels. It is necessity, he says, the most just and inviolable of all laws, which has put arms into their hands; and since they are men, and not angels, do we find it strange that as men, in whose heart is divinely engraven the first law of nature, to defend life and liberty against oppression, they wished to defend themselves against those who desire to ruin and oppress them. On the other side it was argued, against the idea of compromise, that this was to ask royalty to capitulate with its subjects. For, said they, in such case the king will grant them conditions, which, without arms, they would not have obtained. L'Hopital replies, these conditions are not con-

trary to the dignity of the king, his power, or authority. If the king in doing this relinquished any of his right, I could only reply that, to speak freely, it is no longer a right if it prevents the public good; but how could that be a humiliation of the king before the rebels, when he only gives them liberty of conscience, or rather leaves them their conscience at liberty—liberty of conscience is the greatest and purest of all liberty.

Montaigne sometimes treats of law, and develops many correct judicial principles. Thus he denounces the French method of administering justice: "What can be more outrageous than to see a nation where by lawful custom the office of a judge is to be bought and sold; where judgments are paid for with ready money; and where justice may be legally denied to him that has not wherewithal to pay?" What can be more strange than to see a people obliged to obey and pay a reverence to laws they never heard of, and to be bound in all their affairs, both public and private, as marriages, donations, wills, sales and purchases, to rules they cannot possibly know, being neither writ nor published in their own language, and of which they have of necessity to purchase both the interpretation and the use. However, he adopted the sceptical arguments against the intrinsic natural distinctions between right and wrong, and argues against the theory of natural law. But they are pleasant, he says, when, to give some certainty to the laws, they say that there are some given perpetual and immoveable, which they call natural, that are imprinted in human kind by the condition of their own proper being; and of these some reckon three, some four, some more, some less. Now, the only likely sign by which they can argue or infer some natural law is the universality of approbation. Yet we should, without doubt, follow with a common consent that which nature has truly ordained us. Not only every nation, but every private man, would resist the force and violence that any one should do him who would tempt him to any thing contrary to this law.

Stephen de la Boetie, the friend of Montaigne, died in 1563, but his treatise, "Le Contre un ou discours de la servitude voluntaire," was not published until 1578. He was probably the only Republican in France before the period of the First Revolution.

Francis Hottman published the Franco Gallia in 1577. This is chiefly a collection of passages from the early French Historians to prove the share of the people in the Government, and especially their right of electing the Kings of the first two races.

An anonymous treatise, "Vindiciæ contra Tyrannos, auctore Stephano Junio Bruto Celta, 1579," is commonly ascribed to Hubert Languet,[1] the friend of Sir Philip Sidney. The author explains in his preface the nature of his work,—to refer the government of princes and the right of nations, to their legitimate and certain principles, that the power of both may be confined within certain limits, on either side of which a correct administration cannot go:—Principum imperium et jus populorum ad sua legitima certaque principia referre: intra certas fines utrorumque potestatem conclusum iri quos ultra citraque recta reipublicæ administratio plane non possit consistere. He thus lays down the most difficult problem in social science: but professes to teach it with delusive geometrical accuracy. He will employ, he says, the geometrical method which from a point passes to a line, from a line to a surface, from a surface to a body. Such is the scientific method which Languet pretends to employ. But the execution is by no means equal to the design. In the Vindiciæ the following questions are successively treated:—1. Should subjects obey their prince when he commands any thing against the law of God? 2. Is it permitted to resist a prince who commands any thing against the law of God? 3. Is it permitted to resist a prince who oppresses the state? 4. Have neighbouring princes the right of assisting subjects of other princes oppressed for sake of religion or by manifest tyranny? Languet has the merit of having

[1] Hubert Languet, b. 1518, d. 1581.

originated the idea of the social contract: and he sought to establish it by examples taken from sacred history. In the development of the third question he extends the right of resistance to the defence of all natural rights. We enter into the domain of modern politics. The new political rights are discussed, whence arise the revolutions of England, America, and France. The principle of this political doctrine is not novel: it is that the people created the kings. This principle was admitted by the greater part of the jurisconsults, who explained the origin of the empire by a grant of the Roman people. But this cession, it was said, implied the idea of the abandonment of the sovereignty. The people were said to have lost their rights, whether by a tacit abandonment or by a want of exercise. Hubert Languet answers this objection. There is no prescription against the people. Kings die: the people die not; they are like a river that flows for ever. If their leaders have allowed tyranny to be strengthened, their weakness cannot prejudice the people. Time adds to the wrongs of kings; but takes nothing from the rights of the people:—Nec demunt anni quidquam juri populi sed addunt injuriæ regis. The people may have surrendered their power; but they cannot give themselves a master except for the sake of a great advantage. The institution of civil power has for its end to defend individuals against one another by means of justice, and to defend the entire body against external attacks by force. The sole end of government is the advantage of the people. Government is not an honour, but a charge; not an immunity, but a duty; not a leisure, but a mission:—Non honos, sed onus; non immunitas sed munus; non vacatio sed vocatio. Kings being instituted to do justice are then only the guardians and preservers of the law. It is asked whether law depends on the king, or the king on the law. Without doubt, if the kings were always just, there would be little necessity to make laws; but as this is impossible, laws have been instituted by wise and prudent magistrates to the end that they should be the rule accord-

ing to which princes ought to judge; and, to prevent the prince from violating the law, they have associated with him the great men, the magistrates, and the public council that we meet in all forms of government.

Courtiers have given princes the right of life and death over their subjects. But the prince is only the minister and executor of the law. He ought to strike only those whom the law strikes; otherwise he is not a king but a tyrant; he is not a judge, but a brigand. Subjects are not the serfs of the king. Together they are the sovereigns of the king: united they are his brothers—ut universi domini ita singuli loco fratrum censendi sunt.

As regards property, we constantly hear at the Court of Princes that all belongs to the King. Thus what he takes he does not rob; what he does not take he gives. But is it true that men who each love so much their property would have given themselves a master in order to abandon what they had gained with so much trouble? Neither is the king the proprietor of the public domain. The treasury of the prince is one thing, the public treasury another. Without doubt, princes are the proprietors of their private fortune, like other citizens; but in no point of view can they be considered as the proprietors of the royal domain. The royal dignity is not a possession, it is a function. The king is only the curator and administrator of the public wealth. The people, therefore, has ceded the sovereignty only on the conditions that the king should use it for their good. In this sort of contract it is the people that stipulates; it is the king who promises. In return the people promises implicitly to obey, if the conditions have been well executed, and the king on his side promises to fulfil them. Thus the people is engaged under conditions. The king is absolutely engaged; but when a condition is inserted in a contract, it is evident that the contract is not complete, when the condition is not executed. We cannot then call a people perjured which refuses obedience to him who has violated the conditions of his contract. The right of resisting tyrants, that is to say violators of the primitive

compact being once established, it remains to know to whom, how, and by what means it is permitted to resist them. It is necessary to distinguish two species of tyrants. This distinction, familiar in the sixteenth century, was already found in Bartolus De Tyranno. There is the tyrant without title, and the tyrant in practice. The first is he who procures power without title, this is a usurper; the second possesses power with a legitimate title, but abuses it. The conduct of the people ought to be different with regard to these two species of tyrants. Against the first, natural law, the law of nations, and the civil law permit us to take up arms, for natural law authorizes us to defend our life and our liberty when threatened. No contract, no obligation binds us to a tyrant of this species; even a private person can raise himself against this species of tyranny; but if after having obtained power in an illegitimate manner the usurper obtains the approbation of the people, this consent ought to hold the place of a title.

As regards legitimate kings who abuse their power, we must not for every abuse or negligence call them tyrants and declare war against them; even when we have to do with a declared tyrant who openly violates the laws, we must at first endure him, and employ all means before arms, for a remedy may happen worse than the disease; but if he persists in his tyranny, he must be treated as a rebel, and deposed as such. Now, the people is superior to the prince; it has then the right to depose him. Such a revolt could not be accused of sedition, for there are just and unjust seditions. The just, says Bartolus, are those which overthrow an unjust Government, the unjust are those which overthrow a just Government; and in truth the overthrow of a bad Government cannot be called a sedition. But Languet always insists that the right of resistance belongs only to the magistrates. As for private persons, he refuses to them all right to take the initiative. The republic has not been confided to the protection of individuals, for these are not the persons to defend the state who

cannot protect themselves. If they draw the sword they are seditious, for it is only the whole of the citizens who constitute the sovereignty, and individual persons do not. The people ought then only resist through the intervention of their magistrates. If these do not act, the people must remain quiet, and not forget that the best physicians often leave it to nature to cure maladies.

Languet concludes his system by a brief summary. Princes are chosen by God, but constituted by the people. The prince is superior to each individual, but inferior to all, and those who represent all—that is to say, magistrates or the nobles. In the institution of sovereignty, a contract takes place between the prince and the people—a contract tacit or express, natural or civil, of which the officers of the king are the guardians. He who violates this contract is a tyrant in practice. The magistrates have a right to bring him back to his duty by force, if they cannot otherwise; but private men have not the right of drawing the sword against a legitimate sovereign, even though he be a tyrant; in fact, as regards the tyrant without a title, as there is no contract entered into with him, all, even private persons, may rise against him.

CHAPTER II.

1. Machiavelli, 1469–1527.

Authorities:—Sismondi's History of the Italian Republics: London, 1832. Macaulay's Essays: London, 1843. Characteristics of Men of Genius; Chapman: London: Hallam's Literature of Europe. Histoire de L'Economie Politique en Italie, par le Compte J. Pecchio, traduite par Gallois: Paris, 1830. Schlegel's Lectures on the History of Literature. Guizot: Histoire de la Civilization.

Works:—Opere di Niccolo Machiavelli, Cittadino e Segretario Florentino, vol. x. 1826. Œuvres Complêtes de Machiavel, traduites par J. V. Perier, Paris, 1825. Machiavel, son Génie et ses Erreurs, tom. xi. Par A. F. Arland, 1833. The Works of the famous Nicholas Machiavel, Citizen and Secretary of Florence. London, Starkey, 1675. London, Bohn, 1851.

As in Italy the study of the Civil Law was first revived, so Political Jurisprudence here first received an

elaborate scientific cultivation. And the first great writer on politics, after the revival of learning, is the celebrated Niccolo Machiavelli.

Few political treatises had appeared before Machiavelli. The De Monarchia of Dante, another illustrious Florentine,[1] is not, however, a treatise on monarchical government compared with other forms. It is a demonstration of the doctrine cherished by the imperial jurists, that the universe should have only one chief; that in the designs of God this one chief is the Roman people, or its heir, the Emperor; and that in the temporal order of things he has no superior. Two points are remarkable in this work. Dante employs the metaphysics of the Peripatetic Philosophy and its most subtle principles in the demonstration of a political thesis. Next, the work is a sort of philosophy of history, resting on the authority of poetry and science, and which plainly suggested many things to Machiavelli and to Vico. Dante defines monarchy as the government of one chief over all men and over all things. The definition implies that monarchy embraces the universality of the human race and the universality of human interests. He demonstrates the necessity and the right of such a power. To determine the nature of government, the end of political society ought to be known. Politics is a practical not a speculative science. So far as science is practical, it is busied with actions. The nature of an action is related to the end of the action. For example, the action of him who builds a house is determined by the end which he proposes to himself in constructing the house. The end of man is not simply existence, or life, it is the manifestation of intellectual power. It remains to know how this power passes into action. Dante cites Averroès, and seems to admit with him that there is a universal consciousness spread through the human race; and which is realized not in the individual, but in the totality of mankind. This idea has been developed by Savigny

[1] Dante, b. 1265, d. 1321. Janet: Histoire de la Philosophie Morale et Politique, vol. i. p. 375.

in his History of the Roman Law, where he states the origin of Law to be in the common consciousness of the people. Dante proceeds to say that this intelligence acts in two ways—by practical intellect, and by speculative intellect. The end of the first is action and production. The end of the second is pure and simple knowledge, the most perfect of all things. And these metaphysical premises are introduced to arrive at the end that what is true of a part is in this case true of the whole, and that as an individual can arrive at wisdom only in a state of peaceful rest, so the human race can arrive at its end only in a state of Peace. Dante had reason to proclaim the necessity of Peace: for the middle ages were nothing but continual war. A universal monarchy is the condition most favourable to Peace and Justice. Such is Dante's theory; but the proofs and illustrations are most incomplete. The most general doctrine of the jurisconsults of the middle ages was the theory of the divine right of kings. They were almost without exception the partizans of absolute power. But one in particular advocated ideas singularly advanced for the age. Marsilius of Padua wrote the Defensor Pacis in 1314. The greater part of his work is only a commentary on Aristotle. But he terminates by conclusions opposed to the doctrines of the glossators and jurisconsults. He establishes definitely the principle of the sovereignty of the people—Legislatorem humanum, solam civium universitatem esse, aut valentiorem illius partem.[1] The true legislative authority, where the people is sovereign, is the whole body of citizens, or a part of them elected by all. For the utility of a measure is more certain when the entire body of citizens devote to it all their intelligence and energy. And also no one willingly injures himself—nemo sibi nocet scienter. Thus the entire community alone is fit to judge if a measure be conformable to the instincts of one, or of some, or of all. Besides a law is better observed by citizens, when they believe it to be imposed by themselves. The state

[1] Defensor Pacis: Concl. vi.

is a society of few men. This would not be the case if one person, or a few enacted laws of this private authority over all citizens, for then they would be the masters of the rest,—aliorum despotes essent. Thus, according to Marsilius of Padua, the people is not only the source of the imperial power, as most of the jurists of the middle ages admit, in the sense of having conferred upon the Emperor the sovereignty, but the people is, of right, the sovereign and true legislator. He goes farther. He gives the people the legislative and also the executive power, and the right of determining by election who shall exercise the executive power of the state, and of deposing from office for just cause. The three essential points of the entire democratic doctrine are thus found in the writings of Marsilius of Padua, as well as in those of St. Thomas Aquinas—that legislative power belongs to the people—that the legislative power institutes the executive power—that the people may judge, change, or depose the executive power whenever it is wanting in its duties. Such were the theories of Marsilius; and in reading them we might almost suppose that we were perusing a page of Bentham or Mill.

Of all writers on Political Philosophy, none have received so general a condemnation as Machiavelli. The treacheries of the tyrants of the age in which he lived have been attributed to his political writings; and he has been commonly described as the discoverer of ambition and revenge—the original inventor of perjury among princes. Yet, even if his political works on the whole displayed nothing but the scientific atrocity in which Milton's fiends would have exulted, it would still be necessary for the historian of Jurisprudence to peruse and consider them as the results of the political experience and political wisdom of the age in which they were composed. The vices of the Italians of the middle ages, like those of the Greeks in their decline, sprung from the necessities of their position. They possessed the highest civilization of the age in which they lived. Almost alone of nations, they cultivated literature and the arts. But the merchant aristocracy of Florence,

Pisa, Genoa, and Lucca were unable to furnish from their republics soldiers to cope with the rude barbarians of France, Switzerland, and Arragon. Open force they were compelled to meet with secret teachery. Barbarian violence they sometimes defeated with poison and assassination. By such policy on the part of their rulers, the civilization of the Italian republics was for a time preserved. Let that civilization atone to the world for the treacherous policy by which its rulers, for a time, maintained themselves in power. The names of Dante, Petrarch, and Boccaccio, Cimabue, Raffaelle and Michael Angelo, outweigh the cruelties of the Borgias. And let not the age which has witnessed the splendid triumph of Louis Napoleon be too severe on the author who scientifically treated of that princely dissimulation without which perchance princes could not have then existed. The political enemies of Louis Napoleon will always assert his power to have originated in treachery and murder. But they must admit that power has been used to forward the greatness of France. The French, as a nation, appear unsuited for parliamentary government. They require a despotic master of the school of Machiavelli. Political truth can only be discovered by the study and analysis of the past. Succeeding centuries will regard even the open wars of the nineteenth century with the same detestation which we entertain towards the secret crimes of the Borgias. To the jurist, the study of the history of the Italian Republics is peculiarly interesting. With them first, after the dissolution of the Roman empire, began the science of governing men for their advantage. Former governments had been but the tyrannies of armies over subjected slaves. In the petty Italian republics victors and vanquished were fused into one people, united by a single bond —the public good. To one element in particular was the precocious development of the Italian burghs into powerful republics due. Italy had never been wholly in the power of the barbarians. The South was dependent on the Greek Emperor. Even that part of the North which the barbarians occupied had all been cleared and

cultivated; so that forests no longer remained for the barbarian nobles to enjoy the chase or lead their old country life. Even those hordes that remained were broken in power. The Ostrogoths were defeated by Belisarius. The Lombard Kingdom was destroyed by the Franks. The barbarians, then, were never exclusive masters of the territory and society of Italy; and but a feeble feudalism was established beyond the Alps. The preponderance, therefore, instead of passing to the inhabitants of country districts, adhered to the towns. When this became decided, a considerable number of the fief-holders settled within the cities. The barbarian nobles became burghers. They brought their energy, independence, and fiery spirit of freedom with them; whilst at the same time they relieved their fellow burghers from the terrors of feudal tyranny. Hence arose their great and precocious superiority. The Italian cities for the most part date the commencement of their liberties from the invasion of Otho the Great in 951. For three centuries, during which history is almost silent concerning them, they laboured, and flourished in their labour. At the close of the thirteenth century a degree of prosperity had been attained which Italy may now look back to with regret. Then were perfected the great works of industry which still fertilize the land. The Naviglio Grande of Milan, which yet spreads the clear waters of the Ticino over Lombardy, was begun in 1179, and terminated in 1262. If we turn to the cities, we see them adorned by the palaces of the aristocracy, enriched with the finest works of sculpture—the streets paved with broad flag stones. Whilst, at the same time, the nobles of Germany and England, in building their castles, thought not of beauty, but only of defence, and the streets of Paris were almost impassable from mud. The crusades had brought to the Republics of Italy a large increase of wealth. The great maritime states of Venice, Genoa, and Pisa, united their fleets to fight the Turks and pirates,—or, delivered from those foes, they fought amongst themselves for supremacy. "Genoa la superba"

had already built the palaces now, after six centuries, the wonder and admiration of travellers. She maintained military and mercantile colonies at St. Jéan d'Acre in the Holy Land; at Pera, opposite Constantinople, and in the Crimea, in the Black Sea. Pisa was already celebrated for the "profusion of marble, the patrician towers, and the great magnificence." She had conquered Sardinia and the Balearic Isles; and was the first to introduce into Tuscany the arts which ennoble wealth. Her Dome, her Baptistery, her leaning tower, and her Campo Santo, had been successively built from the year 1063 to the end of the twelfth century. The churches of Santa Croce and Santa Maria were begun. They are not finished yet. Giovanni Villani has given us an ample and precise account of the state of Florence in the early part of the fourteenth century. The great manufacture of wool alone employed two hundred factories, and thirty thousand workmen. The cloth annually sold produced a sum equal in exchangeable value to two millions and a half of our money. Eighty banks conducted the commercial transactions of Florence. The city and its environs contained one hundred and seventy thousand inhabitants. At the commencement of the fourteenth century the revenue of the Republic amounted to three hundred thousand florins of gold, more than, three centuries afterwards, England and Ireland united produced to Queen Elizabeth. But during the period of this greatest prosperity of Florence, culminating in the age of Lorenzo the Magnificent, England was distracted by the Civil Wars of the Roses. The battles of Northampton, Wakefield, St. Albans, Towton, Barnet, and Tewkesbury, are the historical events. France was desolated by the English wars and the Jacquerie. Both countries exhibit a miserable spectacle of poverty and barbarity. In both the name of scarcely a single great man appears. These miseries then existed in France and England, now the seats of the most flourishing nations,—the most advanced and refined civilizations. But Florence, built of marble, and robed in the silks of the East, was then succes-

sively ennobled by the divine melancholy of Dante, the mirth of Pulci, the political wisdom of Machiavelli, the magnificence of Lorenzo de Medici.

Not only had the Italian Republics prospered before modern political science arose, but they put in practice many of the ideas which this science cultivates, explains, and brings to perfection for the wealth and prosperity of nations. Amalfi introduced a maritime code, which became the law of all navigators; to this city also is attributed the discovery of the compass. Milan from the year 1260 had practised a census of the land. Venice towards the end of the twelfth century discovered a new financial resource in the public loans, and also authorized the circulation of paper-money. Venice also promulgated the wisest sanitary laws, and adapted statistics to administrative science. The Florentines, who were the first to have banks in most parts of Europe, were also the first to arrange the expenses of the state according to the annual revenue and expenditure. The gonfalonier, Pierre Soderini, in rendering an account of his administration, submitted, in 1510, to the examination of the Great Council, the table of the revenue and expenses of the eight preceding years. Genoa gave the first example of exclusive privileges accorded to a company in payment of the loan which the state obtained from the company. The monts-de-pietè were another invention useful in their generation. Finally, all the Republics honoured commerce by dignities and distinctions; and nobles did not consider themselves disgraced by engaging in trade.

The prodigious prosperity of these states, and all these useful discoveries, were not the work of blind empiricism; they were the work of liberty. Experience alone, without liberty or science, does not furnish sufficient means of instruction, and brings men to prosperity but slowly. Liberty is not an empty word, an imaginary being created by the poets, but a powerful and real benefactress of the nations. She works prodigies, multiplying a hundred-fold the forces of the imagination and the

soul, stimulating the keen rivalry which she excites, offering to person and property that certainty without which there can be neither industry nor commerce, finally making all ideas and all interests converge towards the common good.

A great blot appears upon all this Italian prosperity. The refined Italian merchants had not the leisure which then was necessary to men who desired to be trained as soldiers. The strength of armies lay in their cavalry. These were covered from head to foot with iron, and armed with ponderous lances. No infantry of the day was supposed capable of withstanding their charge. But it required the labour of years to train the man-at-arms to sustain his armour and wield his spear. It would have been well for the prosperity of the Italian States if they had had political wisdom to adopt the expedient of standing armies;—if some portion of their own citizens had been armed by them for the common defence. Then some patriotism animates the soldier, and he is unwilling to imbrue his sword in his country's blood. But they do not appear to have thought of this modern discovery in political science. Mercenary foreign soldiers alone were employed; ever ready to sell their lances to the best bidder, and to turn them to-morrow against the State which employed them to-day. From the difficulties of their position arose the character of the statesmen of the Tuscan and Lombard Republics. They were traitors and assassins. They knew not and despised military courage—the sole virtue of the licentious and drunken soldiers who came from beyond the Alps. But at the same time they cultivated eloquence, poetry, and the fine arts with complete success. Machiavelli, in his public conduct, was upright and honourable; but because amongst his own discoveries in political science he scientifically treated of the opinions current in the fashionable morality of the day, he has been gibbeted by posterity.

In times such as these he flourished. Niccolo Machiavelli was born at Florence on the 5th of May, 1469, of

a poor, old, and noble family. We know nothing about his youth, and all that can be gathered from his own writings consists of a few brief allusions to his dependence and poverty. His talents must have rapidly attracted the notice and commendation of the statesmen of the time; and we find him in 1498, being then only twenty-nine years of age, appointed by the "Ten of Liberty and Peace" the secretary of the Florentine Republic. This was the government, the remnant of the ancient oligarchy, which ruled Florence between the expulsion of the Medici in 1494, and their return in 1512. For fourteen years he was thus employed as secretary, or exercised his diplomatic policy in the numerous embassies which Florence despatched to the Courts of Europe. But when the popular government was overthrown, and the Medici returned to Florence supported by the arms of Spain, Machiavelli was arrested on a charge of conspiracy against the new government, imprisoned, and tortured with "the cord." Immediately after this he composed his great political works; but none of his writings were published during his life, and they first appeared in Rome in 1532, with an approbation of the Pope. "The Prince,"—the work by which Machiavelli is best known to those who unsparingly condemn him,—was dedicated to Lorenzo de Medici. This book was written in 1513, after the fall of the Republican Government at Florence; when Machiavelli, living in retired poverty, and despairing of the liberty of his country, was disposed to support any government which might secure her independence. He naturally felt the reluctance of every man of talent who has once been employed in political affairs to waste the best years of his life in idleness. And he wrote "The Prince" to recommend himself to the notice of the Medici. He thought it better to serve some master usefully for the State than to remain in poverty and obscurity.

"The Prince" commences with a dissertation upon the several sorts of government, which Machiavelli divides first into commonwealths and monarchies, and these

again into hereditary and mixed. The latter term he applies to a monarchy in which are territories lately annexed to the dominion of the conqueror. He also applies the term to cases where the new acquisition arises from the talent of a prince in subverting the liberties of a people and acquiring absolute power for himself. In the third chapter occur some of the politic maxims of kingcraft, which have been so censured. Thus, speaking of the manner in which to treat a conquered province, he says: It is to be observed, men are either to be flattered and indulged, or utterly destroyed; because for small offences they do usually revenge themselves, but for great ones they cannot; so that injury is to be done in such a manner as not to fear any revenge.

Again, he says in chapter iii.: That it is very obvious, and no more than natural, for princes to desire to extend their dominion, and when they attempt nothing but what they are able to achieve, they are applauded, at least not upbraided thereby; but when they are unable to compass it, and yet will be doing, then they are condemned, and indeed not unworthily. If France then with its own forces alone had been able to have enterprised upon Naples, it ought to have been done; but if her own private strength was too weak, it ought not to have been divided; and if the division of Lombardy, to which she consented with the Venetians, was excusable, it was done because to get footing in Italy. But this partition of Naples with the King of Spain is extremely to be condemned, because not pressed or quickened by such necessity as the former. Louis, therefore, committed five faults in this expedition. He ruined the inferior lords; he augmented the dominion of a neighbour prince; he called in a foreigner as puissant as himself; he neglected to continue there in person; and planted no colonies; all which errors might have been no inconvenience whilst he lived, had he not been guilty of a sixth, and that was depressing the power of the Venetians. If indeed he had not sided with the Church, nor brought the Spaniards into Italy, it had been but reasonable for him to have taken

down the pride of the Venetians; but pursuing his first resolutions, he ought not to have suffered them to be ruined, because whilst the Venetian strength was entire, they would have kept off other people from attempting upon Lombardy, to which the Venetians would never have consented, unless upon condition it might have been delivered to them, and the others would not in probability have forced it from France, to have given it to them; and to have contended with them both, nobody would have had the courage. . . . . So then King Louis lost Lombardy, because he did not observe one of those rules which others have followed with success in the conquest of provinces, and in their desire to keep them; nor is it an extraordinary thing, but what happens every day, and not without reason. To this purpose I remember I was once in discourse with the Cardinal d'Amboise, at Nantes, at the time when Valentino possessed himself of Romagna. In the heat of our conference he telling me that the Italians were ignorant of the art of war; I replied that the French had as little skill in matters of state; for if they had had the least policy in the world, they would never have suffered the Church to come to that height and elevation. And it has been found since by experience that the grandeur of the Church and the Spaniard in Italy is derived from France, and that they in requital have been the ruin and expulsion of the French. From hence a general rule may be deduced, and such a one as seldom or never is subject to exception, viz., that whoever is the occasion of another's advancement is the cause of his own diminution; because that advancement is founded either upon the conduct or power of the donor, either of which becomes suspicious at length to the person preferred.

The chapters on the military force of a state are interesting; the first assumes, as an unquestionable truth, that good laws and good arms are the principal foundation of every state. Machiavelli describes the different kinds of troops then in use; in bold and powerful language paints the destruction which is inevitable to any

state that relies upon foreign mercenary forces; and in chapter xiii. draws the conclusion, that without having proper and peculiar forces of his own, no prince is secure, but depends wholly upon fortune, as having no native and intrinsic strength to sustain him in adversity.

Chapter xvii. is headed "Of Cruelty and Clemency, and whether it is best for a Prince to be beloved or feared." He says,—

Every prince is to be esteemed rather merciful than cruel, but with great caution, that his mercy be not abused. Cæsar Borgia was counted cruel, yet that cruelty reduced Romagna, united it, settled it in peace, and rendered it faithful; so that if well considered, he will appear much more merciful than the Florentines, who, rather than be thought cruel, suffered Pistoia to be destroyed. A prince, therefore, is not to regard the scandal of being cruel, if thereby he keeps his subjects within their allegiance and united, seeing by some few examples of justice you may be more merciful than they, who, by a universal exercise of pity, permit several disorders to follow, which occasion rapine and murder; and the reason is because that exorbitant mercy has an ill effect upon the whole universality, whereas particular executions extend only to particular persons. . . . And from hence arises a new question, "Whether it be better to be beloved or feared, or feared than beloved?" It is answered, both would be convenient, but because that is hard to attain, it is better and more secure (if one must be wanting), to be feared than loved; for in general men are ungrateful, inconstant, hypocritical, fearful of danger, and covetous of gain: whilst they receive any benefit by you, and the danger is at a distance, they are absolutely yours; their blood, their estates, their lives, and their children (as I said before), are all at your service; but when mischief is at hand, and you have present need of their help, they make no scruple to revolt. And that prince, who leaves himself naked of other preparations, and relies wholly upon their professions, is sure to be ruined; for amity contracted by price, and not by the greatness and gene-

rosity of the mind, may seem a good pennyworth, yet when you have occasion to make use of it, you will find no such thing. Moreover, men do with less remorse offend against those who desire to be beloved, than against those who are ambitious of being feared, and the reason is because love is fastened only by a ligament of obligation, which the ill-nature of mankind breaks upon every occasion that is presented to his profit; but fear depends upon an apprehension of punishment, which is never to be dispelled.

But in the eighteenth chapter the principles of this crooked policy are carried to the utmost extent. He says,—

How honourable it is for a prince to keep his word, and act rather with integrity than collusion, I suppose everybody understands; nevertheless experience has shown in our own times, that those princes who have not pinned themselves up to that punctuality and preciseness have done great things, and by their cunning and subtlety not only circumvented and directed the brains of those with whom they had to deal, but have overcome and been too hard for those who have been so superstitiously exact. For further explanation you must understand that there are two ways of contending, by law and by force; the first is proper to men, the second to beasts; but because many times the first is insufficient, recourse must be had to the second. It belongs therefore to a prince to understand both, when to make use of the rational, and when of the brutal way. . . . A prince, therefore, that is wise and prudent, cannot nor ought not to keep his word, when the keeping of it is to his prejudice, and the causes for which he promised removed. Were men all good this doctrine was not to be taught; but because they are wicked, and not likely to be punctual with you, you are not obliged to any such strictness with them; nor was there ever any prince that wanted lawful pretence to justify his breach of promise. I might instance in many modern examples, and show how many considerations, and peaces, and promises have been broken

by the infidelity of princes, and how he that best personated the fox had the better success. Nevertheless, it is of great consequence to disguise your inclination, and play the hypocrite well; and men are so simple in their temper, and so submissive to their present necessities, that he that is neat and cleanly in his collusions, shall never want people to practise them upon. I cannot forbear one example which is still fresh in our memory. Alexander VI. never did nor thought of any thing but cheating, and never wanted matter to work upon; and though no man promised a thing with greater asseveration, nor confirmed it with more oaths and imprecations, and observed them less, yet, understanding the world well, he never miscarried. A prince, therefore, is not obliged to have all the forementioned good qualities in reality; but it is necessary to have them in appearance; nay, I will be bold to affirm, that having them actually, and employing them upon all occasions, they are extremely prejudicial—whereas, having them only in appearance, they turn to better account. It is honourable to seem mild and merciful, and courteous and religious, and sincere, and indeed to be so, provided your mind be so rectified and prepared that you can act quite contrary upon occasion. And this must be premised, that a prince, especially if come but lately to the throne, cannot observe all those things exactly which make men be esteemed virtuous, being oftentimes necessitated for the preservation of his state, to do things inhuman, uncharitable, and irreligious; and therefore it is convenient his mind be at his command, and flexible to all the puffs and varieties of his fortune; not forbearing to be good, whilst it is in his choice, but knowing how to be evil when there is a necessity. A prince, then, is to have particular care that nothing falls from his mouth but what is full of the five qualities aforesaid, and that to see and to hear him he appears all goodness, integrity, humanity, and religion; which last he ought to pretend to more than ordinarily, because more men do judge by the eye than by the touch, for everybody sees, but few understand; everybody sees

how you appear, but few know what in reality you are, and those few dare not oppose the opinion of the multitude who have the majesty of their prince to defend them; and in the actions of all men, especially princes, where no man has power to judge, every one looks to the end. Let a prince, therefore, do what he can to preserve his life and continue his supremacy; the means which he uses shall be thought honourable, and be commended by everybody; because the people are always taken with the appearance and the event of things, and the greatest part of the world consists of the people; those few who are wise taking place when the multitude has nothing else to rely upon. There is a prince this time in being (but his name I shall conceal), who has nothing in his mouth but fidelity and peace, and yet had he exercised either one or the other, they had robbed him before this of his power and reputation.

This passage has condemned Machiavelli as a black-hearted traitor. Yet most of the other principles in the book are good. He advises economy to the prince, that he may not be the oppressor of his subjects. He should cultivate rigid and severe justice as the surest road to mercy. He should preserve respect for religion, avoid flatterers, secure the free advice of the wisest of his subjects. In truth, all the political philosophy of Machiavelli will bear the light and experience of the nineteenth century, save the passages which show the means whereby absolute power is to be acquired and preserved. And if a statesman were now to write how absolute power is to be acquired and maintained, he would write the same as Machiavelli did three centuries and a-half ago. In fact, all the acts of tyranny which we read of in Machiavelli had been previously unfolded by Aristotle. What is, in its nature, repugnant to truth and justice, can only be maintained by perjury and injustice. The commentary of Machiavelli on absolute power merely places in a scientific formula a digest of the principles of tyranny. Christian endurance tells us it is better not to exist at all than to exist at the price of virtue; but however this

virtue has been practised by the martyrs and saints of God, it has not yet arrived at the region of governments. And Machiavelli boldly cast off the veil of hypocrisy by which the villanies of tyrants had been concealed.

Machiavelli, too, had an ideal—an ideal of a citizen, and not of a philosopher; his Italian country recovering her independence, the Italian States reconstituted under the hand of a prince—albeit a tyrant. This is his excuse; he sacrifices morality to patriotism. In accordance with this idea, and as it were to show the conclusion at which he arrived, "The Prince" concludes with an exhortation to Lorenzo de Medici to deliver Italy from the barbarians: Though formerly some sparks of virtue have appeared in some persons that might give her hopes that God had ordained them for her redemption; yet it was found afterwards that in the very height and career of their exploits they were checked and forsaken by fortune, and poor Italy left half dead, expecting who would be her Samaritan to bind up her wounds, put an end to the sackings and devastations in Lombardy, the taxes and expilations in the kingdom of Naples and Tuscany, and cure her sores which length of time had festered and imposthumated. 'Tis manifest how she prays to God daily to send some person who may redeem her from the cruelty and insolence of the barbarians. 'Tis manifest how prone and ready she is to follow the banner that any man will take up; nor is it at present to be discerned where she can repose her hopes with more probability than in your illustrious family, which, by its own courage and interest, and the favour of God and the Church (of which it is now chief), may be induced to make itself head in her redemption. . . . This opportunity, therefore, is by no means to be slipped, that Italy after so long expectation may see some means of deliverance. Nor can it be expressed with what joy, with what impatience of revenge, with what fidelity, with what compassion, with what tears, such a champion would be received into all the provinces that have suffered by these barbarous inundations. What gates would be shut

against him? What people would deny him obedience? What malice would oppose him? What true Italian would refuse to follow him? There is not anybody but abhors and nauseates this barbarous domination. Let your illustrious family then address itself to this work with as much courage and confidence as just enterprises are undertaken; that under their ensigns our country may be recovered, and under their conduct Petrarch's prophecy may be fulfilled, who has promised that—

> "Virtù contr' al furore
> Prendera l' arme, et fia il combatter corto,
> Che l' antico valore
> Ne' gl' Italici non e ancor' morto."

Frederick Schlegel believed that the object of Machiavelli was to inspire the great princes of Italy with the ambition of giving liberty to his country; and that, in this cause, it was right to make use of those unrighteous means by which others had effected her degradation. He has also pointed out that, in his opinion, the chief fault of Machiavelli consists not in his defence of the principle that the end sanctifies the means, but in this, that he was the first who introduced into modern and Christian Europe the fashion of reasoning and deciding on politics exactly as if Christianity had no existence. When we are impressed with a sense of the existence of God, the whole of our thoughts and principles have acquired a dignity to which we could not otherwise aspire. The visible is everywhere dependent on the unseen; and as the body is moved and regulated by the soul, so are men, nations, and states held together by the belief and the reverence of the Godhead. The moment we take away this soul, this internal and universal principle of life, the whole composition is loosened and destroyed; if we obscure its light, and obstruct its influence upon the whole, the individual members of the organic or of the political body may still preserve some power of life with them; but this life will be narrow, separate, insignificant, misdirected and destructive, rather than beneficial. It will form a principle of disunion, not

a bond of harmony. When that chain of morality and religion, by which states and nations are connected together, has once fairly been broken, the destructive poisons of darkness, anarchy, and despotism begin immediately to operate, and vice is ever ready to occupy the deserted station of virtue.

But in the succeeding political works of Machiavelli we find a development of most that is good in The Prince, with some opinions directly the reverse of those portions which are censurable. The Discourses on the First Decade of Livy, were written about a year after the composition of The Prince. They give the author's views on some questions of Republican Government. After the fashion of the discourses of the Greek philosophers, these were recited to the young men of Florence in the gardens of Cosimo Rucellai. The discourses on Livy are divided into three books. In the first he treats of the internal government of the Romans, but introduces much historical learning and illustration, and discusses many political principles.

In one passage he recommends, like Cicero and Tacitus, a triple form of government. The wisest legislators, finding the defect of want of permanence in the simple forms of monarchy, aristocracy, and democracy, and avoiding every one of these kinds, thus framed a government which should consist of them all, believing it to be more permanent and stable, because prince, nobles, and people, living in the same city, and communicating in the same government, they would be all of them in sight of one another, and more capable of correction. He considered, without this, that the simple forms of government, monarchy, aristocracy, and democracy, would necessarily pass from one to another in the cycle of ages. Byron, imitating the same idea, also has said, in Childe Harold:—

> "There is the moral of all human tales,
> 'Tis but the same rehearsal of the past:
> First freedom, and then glory, when that fails,
> Wealth, vice, corruption, barbarism at last,
> And history with all her volumes vast
> Hath but one page."

Such were the ideas of Machiavelli. And Vico appears to have been the last great writer who predicted for every nation a decline and fall. But in the development of the representative system of government and of individual liberty there appears to be some security for permanent progress. When these do not exist there is none.

In the tenth chapter Machiavelli praises those who lay the foundations of a commonwealth. Among all excellent and illustrious men, they are the most praiseworthy who have been the chief establishing of religious and divine worship; in the second place are they who have laid the foundations of any kingdom or commonwealth; in the third those who, having the command of great armies, have enlarged their own or the dominion of their country. In the next, learned men of all sciences, according to their several studies and degrees; and last of all (as being infinitely the greater number) come the artificers and mechanics,—all to be commended as they are ingenious or skilful in their professions. On the other side, they are infamous and detestable who are contemners of religion, subverters of governments, enemies of virtue, of learning, of art, and, in short, of every thing that is useful to mankind, and of this sort are the profane, the seditious, the ignorant, the idle, the debauched, and the vile. And although Nature has so ordered it that there is neither wise man nor fool, nor good man nor bad, who, if it were proposed to him which he would choose of these two sorts of people, would not prefer that which was to be preferred, and condemn the other, yet the generality of mankind, deluded by a false impression of good and a vain notion of glory, leaving those ways which are excellent and commendable, either wilfully or ignorantly wander into those paths which will lead them into dishonour; and whereas to their immortal honour they might establish a commonwealth or kingdom as they please, they run headlong into a tyranny, not considering what fame, what glory, what affection, what security, what quiet and satisfaction of

mind they part with, nor what reproach, scandal, hatred, danger, and disquiet they incur.

He proceeds to show how a people accustomed to the dominion of a prince, though by accident they may acquire their liberty, yet can maintain it with difficulty; and that a people wholly corrupted in their manners may possibly recover their liberty, but they will find insuperable difficulty to maintain it; and how much that prince or commonwealth is to be condemned that neglects to train up native soldiers.

In the fifty-eighth chapter he advances an opinion which now is held by most political writers, but certainly was then a novel one in politics, that the multitude is wiser and more constant than the prince:—I know not whether I shall not seem too bold, to undertake the defence of a thing which all the world opposes, and run myself upon a necessity of either quitting it with disgrace, or pursuing it with scandal; yet, methinks, being to maintain it with arguments, not force, it should not be so criminal. I say then, in behalf of the multitude, that what they are charged withal by most authors, may be charged upon all private persons in the world, and especially upon Princes; for whoever lives irregularly, and is not restrained by the law, is subject to the same exorbitancies, and will commit as bad faults as the most dissolute multitude in the world. . . . . And if the comparison be made betwixt mixed principalities that are circumscribed and bounded by laws and popular governments under the same ties and restrictions, the People will be found more virtuous than the Princes; but if it be betwixt loose and dissolute governments, both of the one kind and of the other, the errors on the side of the Princes will appear more great, more numerous, and more incapable of redress: for, in popular tumults, a sober man may interfere, and, by fair words, reduce them to reason; but to an enraged Prince who dares intercede, or what remedy is there to repair to, but violence and the sword? From whence we may judge and distinguish betwixt the inconvenience of the one and the

other: the People are appeased with gentleness and good words; and the Prince not to be prevailed upon but by violence and force; and, if it be so, who will deny that the disease is more dangerous where the cure is most difficult? Moreover, when the People tumultuate, there is not so much fear of any present mischief that they are likely to commit as of the consequences of it, and that it may end in a tyranny. But with ill Princes it is quite contrary; the present misery is the most dreadful, because they hope when he dies their liberty may be recovered. You see, then, the difference betwixt them, —one is more dangerous for the present, and the other for the future; the cruelty of the People extends only to such as in their opinion conspire against the common good. The severity of the Prince is more against them who design against his particular interest.

He again treats of the danger of employing foreign forces. In prudence, a prince or commonwealth is to take any course rather than to bring himself into a necessity of employing auxiliaries, especially when he is to rely wholly upon them. Nor can an ambitious state or prince have a more commodious occasion to possess himself of a city or province, than when he is invited in this manner for its assistance and defence. He also insists on the necessity of constant reforms in a State. It is as clear as the day that no bodies of men are of long duration unless they be renewed. And the way to renew them is to reduce them to their first principles. For the foundations of all sects, commonwealths, and kingdoms have always something of good in them. These discourses on Livy have no regular arrangement, so that nearly the same thoughts occur in different chapters.

I may conclude my brief notice of Machiavelli with the criticism of Mr. Hallam:—Few political treatises can even now be read with more advantage than the Discourses of Machiavel; and in proportion as the course of civil society tends further towards democracy, and especially if it should lead to what seems the inevitable consequence of democracy, a considerable subdivision of

independent states, they may acquire an additional value. The absence of all passion, the continual reference of every public measure to a distinct end, the disregard of vulgar associations with names or persons, render him, though too cold of heart for a generous reader, a sagacious and useful monitor for any one who can employ the necessary methods for correcting his theorems.

2. Machiavelli exercised a double influence—one general, the other particular. He spread the taste for political science, and introduced the philosophy of history into the domain of politics. He also formed a school which lasted during the sixteenth century and part of the seventeenth, and which had for its principle and dogma the right to use fraud in matters of public politics.

Guicciardini, the historian of the wars of Italy, a Monarchist in politics, was opposed to the Democratic principles of Machiavelli. But he heartily concurred in those peculiar doctrines which are best known under the name of Machiavellism. Thus he lays down a rule that when a prince wishes to deceive another prince by means of an ambassador, he should commence by deceiving the ambassador, who then will pursue with much more earnestness what is confided to him, if he think that he is acting seriously than if he be obliged to feign. Candour and openness, says Guicciardini, are praised by all men. They are the marks of a generous soul, nevertheless they are sometimes inconvenient. On the contrary, fraud is useful, nevertheless it is detested, it bears with it shame; and, if it be necessary, it is only by reason of the wickedness and perfidy of others. Finally, we justly hesitate which of the two we ought to choose. Guicciardini considers that candour ought to be ordinarily used, but the other cannot be despised. In the ordinary usage of life, it is necessary to prefer the use of candour in order to obtain the reputation of a sincere man. Nevertheless, there are certain cases where dissimulation may be employed, and it will be useful to those who will cause others to believe them the more

readily, because they first believed in their sincerity. Guicciardini finally blames the man who continually resorts to lies; but excuses him that does so sometimes.[1] We recognise an age of distrust and tyranny in the words—"The man who lives under a tyranny must take care even when he speaks with his most intimate friends, not to let them see the bottom of his thoughts; for he must know that he is surrounded with all sorts of stratagems to unveil his secret sentiments."

By Machiavelli and Guicciardini fraud is discussed as a thing completely natural; and no attempt is made to exculpate or defend it. But when these doctrines were attacked, Machiavellism prepared a systematic defence. Scioppius[2] wrote the method of Politics—Paidia Politices; Παίδια Πολιτίκης, ostensibly in defence of the doctrines of Aristotle and St. Thomas Aquinas. But he selects from their writings some passages, which, separated from the rest, appear to contain the doctrines of the Prince. Scioppius pretends to demonstrate this thesis, that Politics are distinct from Morals, that each science has its own principles, and that to introduce the principles of Morality into Politics is to confound the limits of the sciences, and to violate the laws of method. The errors of his adversaries came from their ignorance of Logic. Logic teaches the method of proof. The method of a science consists only in employing the principles proper to it, and in rejecting those that are foreign. The end of politics is the happiness of the State. Such being the case, it must be occupied not only with the best form of government, but also with the best in a given situation. As the science of medicine not only occupies itself with a state of perfect health, but also with all possible degrees of health, so Politics should treat not only of a perfect government, but of all governments. It is also more important that politics should treat of bad forms of government than of good. Good governments are like good vessels which support themselves. The bad are those which have need of assistance. Such is the opinion of St. Thomas: "Those

[1] Guicciardini, b. 1482, d. 1540. Works, Guicc. xcii.
[2] Scioppius (Gaspar Schopp), b. 1576, d. 1649.

which are the best ordered according to reason can sustain many and great shocks. But the badly ordered are destroyed by trifling shocks, and therefore need greater caution."—Illæ quæ optimè ordinatæ sunt secundum rationem, multos impulsus et magnos sustinere possunt. Malè autem ordinatæ a modicis corrumpuntur, et ideo majori indigent cautelâ. Hence arises the error of Plato who treats only of the best form of government. His doctrine has no utility, men being incapable of supporting this perfect form. The business of politics is to treat of those things which are really useful and practicable. Unhappily evil forms of government are more conformable to human nature than the good. It results, says Scioppius, from these principles, that to treat of tyranny and of the means of preserving it is to remain faithful to the objects of politics, and those who reproach a publicist with having spoken of tyranny, reproach him with having treated of the subject matter of his science. Another error is to reproach publicists with not introducing into politics principles that are wholly strange. The wicked and the base are ideas that belong to morals, not to politics. Morality has two parts, one general, one particular. The first gives principles, the second precepts. The science of politics studies what is; morals, what ought to be. Still Scioppius acknowledges that the separation could not be absolute. Consequently, even although logic should desire, that politics should speak of tyranny as of a fact without examining whether it be good or bad, prudence exacts that we should blame tyranny, and turn men aside from it. For the object of politics is the happiness of the State, and tyranny neither produces the happiness of him that exercises it, or of him that suffers.

Such is a brief sketch of the little book of Scioppius, which plainly was written in defence of Machiavelli, although he is not named. Machiavellism, in the sixteenth century, influenced even the writings of its opponents. Thus Justus Lipsius[1] appears to make Politics rest on

[1] B. 1547, d. 1606. Works, 6 vols. fol., Antwerp, 1637. Politicorum sive civilis doctrinæ, Libri IV. Les Politiques ou Doctrine civile de Juste Lips. Traduction Franc. 4th ed. Paris, 1598.

Morality. His first book is entirely consecrated to the enumeration of the virtues of the prince. The prince should not be a lord over serfs, but a governor over citizens. The prince should be content with repentance rather than punishment. If contracts and conventions be violated there is no longer commerce amongst men. The covenants of peace should never be violated, nor should good faith be postponed to sovereignty. Such are the maxims of Lipsius; but they are not his only maxims. He admits deceit into politics. He does not go quite so far as Machiavelli, and sets boundaries to the domain of fraud. There are, according to him, three species of fraud, the trivial, the mean, and the great. The first is not too far removed from virtue, and is bedewed only with some drops of malice ; it is defiance and dissimulation. The second touches on the borders of vice ; it is conciliation and corruption. The third is separated not only from virtue, but from laws ; it is perfidy and injustice. He advises the first, endures the second, and condemns the third. He approves and permits certain frauds, and what he calls little corruptions and finesse.

To complete a notice of the school of Machiavelli, we must pass the confines of the sixteenth century. The celebrated Fra Paolo Sarpi[1] was the servant, councillor, and secretary of Venice. His book, written in 1615, exposes to us the means of preserving and maintaining Venice in her ancient power, and is inspired as well by Machiavelli as by the traditions of the Council of Ten. He starts with the principle that the Republic will last as long as it does justice. But what is justice? The first justice for the Sovereign is to maintain himself Sovereign. He soon tells us what he means by justice. No nobleman ought to be punished with death, however criminal he may be, because the order of nobility loses more in respect by the humiliation of one of its members than it gains in honour by an act of justice. At least

[1] B. 1552, d. 1623; Opinione del Padre Paolo servita, come debba govenarsi la Republica Veneziana per havere il perpetuo dominio. Venice, 1681. Traduit en Français, par l'Abbè de Marsy, Berlin, 1751.

there should be no public execution. Therefore, in such a case, the criminal should either terminate his life in prison, or be delivered from it in a secret manner. In quarrels between nobles, or between nobles and subjects, there should be two weights and two measures. If a noble without credit and without power maltreat a great man, great severity should be used. If a noble has maltreated a subject, all imaginable means must be sought to put him in the right. If a subject has injured a noble, chastisement must be inflicted to excess. At all price the custom must not be introduced of raising a hand against a Patrician, and the people must be nourished in the idea that a Patrician's blood is sacred. Such were the secret politics of Venice. But if inequality was to be the rule in matters of criminal justice, equality was to be the rule in matters of civil justice. In civil justice, says Fra Paolo, a perfect impartiality must be displayed, and the dangerous opinion must be put down that the balance inclines always to the side of the rich and noble. For all that concerns this civil justice, exactness cannot be pushed too far. In effect, when a citizen is assured of having justice whenever he deserves it, he can be brought to endure much. But, however favourable to the nobles Fra Paolo displays himself, he is not a partisan of aristocracy. His political scheme was this, to transform the aristocracy of Venice into an oligarchy, and to concentrate power into a small number of hands. The government was composed at Venice of three institutions—the great council, or general assembly of the nobles, the democratic element in the constitution; the Senate of Three Hundred, the aristocratic element; the Council of Ten, the oligarchical element. Paolo's plan was to annihilate the Great Council, because it savoured too much of the people. "We ought," says he, "by every species of artifice, procure the Great Council to delegate to the Senate, and to the Council of Ten all authority; but this should be done by secret ways, the mystery of which cannot be discovered until after the event." The laws and constitution of Venice had for

defender a species of tribune of the people called avogador. Fra Paolo does not propose to abolish the office, but designs to intrust it to a man of high birth, more or less bound up with the usurpations of the aristocracy. To Fra Paolo the government of Venice did not appear sufficiently despotic. He has no less contempt for the people than for the small nobility, whom he counsels to keep in poverty. "For they are," says he, "like vipers who cannot use their venom in the cold." His internal policy is secret cunning, concealed partiality in favour of the nobles, mysterious oppression of the people. With respect to external policy, he advises that the people of the kingdom of Candia should be kept with the same precautions as ferocious beasts. They are like convicts who repay indulgence with revolt. Even in the territory of Venice his policy has always the same end—the sacrifice of the interests of the people to the interest of the sovereign. The inhabitants of Brescia, says Fra Paolo, should be deprived of the privilege which they enjoy, that property in their territory can be purchased only by Brescians; for if the Venetians could extend into that happy country, the same result would be seen as in Padua, where scarcely a third of the territory has remained the property of the inhabitants. If there be rich heiresses in the country they should be married to Venetian nobles; whence results two advantages—the enriching of the capital, and impoverishment of the province. If any inhabitant of a province be raised to offices of state, this should be done, because it turns to his particular advantage, and not to the advantage of the country. If he prove the chief of a party he must be exterminated at all hazard; but, if he be powerful, ordinary justice will not serve; let poison do the work of the axe. Piuttosto faccia il veneno l'uffizio di manigeldo. Such were the politics of Fra Paolo, and in a great measure of the Republic of Venice.

There is a certain difficulty in clearly refuting the sophistry of Machiavellism. Is it ever right to do a thing in itself injurious apart from motive? It clearly is. It

is right to oppose violence against a wrong doer ; to slay the man who wrongfully attempts to slay his neighbour. The school of Machiavelli carries this principle one step further, and says it is right to oppose fraud against a wrong doer, and to commit crimes for the sake of the welfare of the state. The idea of complete reciprocity, which is the original idea of justice, an eye for an eye, a tooth for a tooth, is at the root of Machiavellism. But the right to use fraud is not the same with the right of defence. The attack being repulsed all is as before ; no injury has been done to the laws of honour, justice, and morality. Honesty is the best policy in politics as well as in commerce. He who deceives gains in detail, but loses in the whole. If a merchant lose his credit he loses his capital. Honour is the credit of governments.

3. Sir Thomas More, 1480–1535.

De optimo reipublicæ statu deque novâ Insulâ Utopia libri duo, auctore Thomâ Moro, 1516.

Whilst Machiavelli wrote the code of experimental, pagan, and materialist politics, speculative politics inspired by spiritualism, were displayed in England in the writings of another great intellect. The Prince was written in 1513, though not published until 1532. The Utopia was written in 1516 ; it is the counterpart of the Prince, and represents the opposite extreme of the human mind. In place of the purely practical statesman who gives to a state self-preservation as the sole end, we see the reformer who dreams of a new phase of society. With Machiavelli politics were intellect without a heart. Sir Thomas More infused into politics the genius of Christianity. The Utopia is the first great work written by an Englishman in the nature of an essay on Jurisprudence. This celebrated man was successful in most of the public departments of life. His fame as a scholar was spread through Europe. He was an able lawyer, a refined courtier, an enlightened statesman, a diplomatic ambassador. He was the first layman

that was made Lord Chancellor of England, who was not of noble birth, or had not previously filled some high judicial office. In his practice at the bar he was famous for his skill in International Law.

But the authorship of the Utopia alone would have immortalised his name. And with reference to this work it is only to be regretted that the genius which in such an age could develop the principles of the Utopia was not resident in some other person than the Lord Chancellor of Henry VIII. For the extravagances and absurdities of the Utopia, and its very form, were plainly designed by him to soften the severity of his condemnation upon the then government and laws of England. If he had been some obscure scholar, instead of one of the first amongst English statesmen, the principles inculcated in the Utopia would have appeared in a scientific form, and in a regular treatise upon laws and government.

The truly original element introduced by Sir Thomas More into political science is the spirit of justice and charity revealed by the Gospel, and which the grand action of Christianity had caused to be felt in the heart, and often manifested in outward actions. Inspired by the same sentiments in their pathetic exhortations to the great ones of the earth, the Fathers of the Church had not always avoided the errors of Communism. An ardent Christian from conviction, as his religious life and death of martyrdom attest, the author of the Utopia, at sight of the unjust inequalities resulting from feudalism, at the spectacle of the misery of the bulk of the population, embraced the idea of Communism as a consolation, as a recollection also, purified by a holy influence, of the Republic of Plato, as a romantic theme of which he was not the dupe. When, drawing a harrowing picture of the sufferings endured by the immense majority of the people of his time, he declaims on the millions of children abandoned to the ravages of a vicious education —on the corruption that withers, beneath the very eyes of the prince, the young plants that ought to flourish

for virtue—when he adds:—"And you punish them with death, when grown to manhood they commit the crimes which were planted in their hearts from their cradle;" when he condemns excessive punishment, and raises his voice against the punishment of death, for which he substitutes hard labour, we see not only the philosophic presentiment of modern philanthropy, but also the outpourings of a truly Christian spirit.

Utopia [οὐ, τόπος, or "No where"] is an island where perfect happiness arising from perfect government exists. There the Law is the Law of Nature; Religion is love and charity; Peace reigns; Money is unknown.

Some have pretended to discover in the Utopia most of the principles of laws and government in later times illustrated by Adam Smith, Sir James Mackintosh, Sir Samuel Romilly, and Jeremy Bentham. But it is at least singular to find the Chancellor of Henry VIII. advocating the ballot, annual parliaments, a complete form of representative government, and the reform of the barbarous Penal Code of England. In the second book of the Utopia he describes the method of election in the imaginary republic. They take an oath before they proceed to an election that they will choose him whom they think fittest for the office. They give their voices secretly, so that it is not known for whom every one gives his suffrage. The prince is for life, unless he is removed upon suspicion of some design to enslave the people. The Tranibors [1] are newly chosen every year, but they are for the most part still continued. All their other magistrates are only annual.[2]

Sir Thomas More also clearly saw and censured the iniquitous severity of the Criminal Law of England. In the first book, Raphael Hythloday, his great traveller, who had seen Utopia, says, "One day when I was dining with him [the King of England,] there happened to be at table one of the English lawyers, who took occasion to run out in a high commendation of the severe execution of justice upon thieves, who, as he said, were then

[1] Scil. Members of Parliament. [2] De Magistratibus, p. 86.

hanged so fast that there were sometimes twenty upon one gibbet. Nevertheless, it puzzled him to understand, since so few escaped, that there were yet so many thieves who were still found robbing in all places. Upon this, I said with boldness, there was no reason to wonder, since this way of punishing thieves was neither just in itself, nor for the public good ; for, as the severity was too great, so the remedy was not effectual, simple theft not being so great a crime that it ought to cost a man his life, and no punishment, how severe soever, being able to restrain those from robbing who can find out no other means of livelihood. In this not only you, but a great part of the world, imitate ignorant and cruel schoolmasters, who are readier to flog their pupils than to teach them. There are dreadful punishments enacted against thieves, but it were much better to make such good provisions by which every man might be put in a method how to live, and so be preserved from the fatal necessity of stealing and dying for it."[1]

Sir Thomas More in that intolerant age was still a warm advocate of religious toleration. The following extract is taken from the conclusion of the second book: —At the first constitution of their Government, Utopus having understood that before his coming among them, the old inhabitants had been engaged in great quarrels concerning religion, by which they were so broken amongst themselves, that he found it an easy thing to conquer them, since they did not unite their forces against him, but every different party in religion fought by themselves;—upon that, after he had subdued them, he made a law, so that every man might be what religion he pleased, and might endeavour to draw others to it by the force of argument, and by amiable and modest ways, but without bitterness against those of other opinions, so that he ought to use no other force but that of persuasion, and was neither to mix reproaches nor violence with it ; and such as did otherwise were to be condemned to banishment or slavery. This law was made

[1] Utopia, p. 26.

by Utopus not only for preserving the public peace, which he saw suffered much by daily contentions and irreconcilable hurts in these matters, but because he thought the interests of religion itself required it. Such was Sir Thomas More's noble views on the subject of Toleration.

If, again, we examine the constitution of the family planned by this imitator of Plato, we perceive still more the influence of Christianity. Woman, sacrificed by the ancient legislature and by Plato, assumes her natural rank and dignity. A severe legislation presides in respect of marriage. The chastity of woman is honoured; her modesty respected. Add to this the abolition of castes, and the organization of material labour, even by the injudicious clause which imposes it on all, and we perceive the progress of humanity from the days of Plato.

The Utopia has been by far the most successful of the works which have imagined an ideal perfect state of society and manners. The Oceana of Harrington, the Civitas Solis of Campanella, and the New Atlantis of Lord Bacon, have been comparatively failures. Dean Swift, in his treatises of a similar nature, has sacrificed philosophy to Satire.

4. The Spanish Ecclesiastical Jurists, 1500–1600.

Hitherto, amongst works strictly juridical, few have appeared except upon the details of the Roman Law. We have now to consider a series in which the principles of morals, justice, and polity are discussed.

Vasquez, who flourished between 1509 and 1566, in his Controversiæ Illustres, first divided the law of nations into primary and secondary. By the former he understood the mere law of nature, by the latter the civil laws, institutions, and ordinances adopted by the greater part of nations. According to Vasquez, the secondary law of nations is not so much natural as positive, for all those things which belong to the law of nations were first only matters of civil law, but by de-

grees spread to other nations and states; and thus as soon as any thing was invented and accepted by any one man or region, it then was only a matter of civil law, not of the law of nations. On the contrary, also, if whatever now be the law of nations—*Jus Gentium*—were to come into disuse so as to remain almost with only one province, it would almost unquestionably cease to belong to the Jus Gentium, and be only a matter of civil law. This is a most confused idea of the law of nations.

The *Relectiones Theologicæ*[1] of Francis de Victoria is a book which has become remarkably scarce, although it passed through at least six editions, from the first edition published at Lyons in 1557, to the latest published at Venice in 1626. It consists of thirteen *relections*, as the author calls them, or dissertations on different subjects treated as questions of casuistry. Two of these, the fifth entitled *De Indis*, and the sixth *De Jure Belli*, relate to subjects of international law.

The fifth relection enumerates the various titles by which the Spanish assumption of sovereignty over the new world and its inhabitants has been vindicated. The author asserts the natural right of the Indians to dominion over their own monarchy, and to sovereignty over their own country. He denies the assertion of Bartolus, and the other civilians of the school of Bologna, that "the Emperor is Lord of the whole world," or that the Pope could confer dominion on the Kings of Spain over those parts inhabited by infidel barbarians. He rests their title, or what he calls the right of natural society and intercourse, as authorizing the Spaniards to sojourn and trade in those parts of the world, without injuring the native inhabitants. The refusal of hospitality and permission to trade he holds to be a just ground of war, which again might lead to the acquisition of sovereignty, through the right of conquest, confirmed by voluntary cession. He denies the right of

[1] This analysis of Victoria is taken from Wheaton's Law of Nations. I have not been able to procure a copy of the *Relectiones*. Mr. Hallam states there are only two copies in England.

making war upon the infidel natives for refusing to receive the gospel, but asserts that they might be constrained to allow its being preached to those who wished to hear, and prevented from persecuting the new converts. At the same time he seems conscious that his license might be abused by his countrymen, and therefore strives to limit it by tempering their zeal with mercy, and prohibiting all violence which, under the pretext of religion, might minister to their avarice and other worldly passions.

The sixth relection treats exclusively of the laws of war, and examines the four following questions:—1. Whether Christians may lawfully engage in war? 2. In whom the authority of declaring and carrying on war resides? 3. What are causes of just war? 4. What may lawfully be done against an enemy in a just war?

Upon the fourth question Victoria holds that Christians may lawfully engage in defensive war, repel force by force, and recapture their property taken by the enemy. They may even engage in offensive war, which he defines to be that in which compensation is sought for injuries received. These propositions of natural law he supports by quotations from the sacred Scriptures, and the authority of the Fathers of the Church.

He answers the second question by stating that since it is lawful to repel force by force, war merely defensive may be waged by the private authority of the party injured for the defence of his person or property. But there is this difference between a private person and the State, that the right of the former is confined to mere self-defence, and does not extend to the redress of injuries or even to the recapture of things unjustly taken after an interval of time has subsequently elapsed. The resort to force in self-defence must be against a present danger, or as the civilians express it, *in incontinenti*. The State on the other hand has not only the right of defending itself, but of seeking the redress of injuries done to itself or its subjects. The authority of making war for the latter purpose therefore, resides exclusively in

the Sovereign or State. But the question recurs, what constitutes a State? The answer is, that it is a perfect community—that is, such as does not form a part of any other State, but which has its own laws, its own legislature, and its own magistrates; such, for example, as the kingdom of Castile and Arragon, the Republic of Venice, and the like. There may even be several perfect communities or States under the dominion of the same Prince, in whom alone is vested the right of declaring and carrying on war, but this right cannot lawfully be exercised by vassal principalities which form members of an Imperial State.

The third question he answers, in the first place, negatively, that diversity of religious faith is not a cause of just war, nor as against an infidel nation, that they refuse to embrace Christianity, nor the extension of dominion, nor the glory and private advantage of the prince who ought in all things to rule with a sole view to the public interest of the State. The difference between a lawful king and a tyrant consists in this, that the former rules for the good of his people, the latter for his own private advantage. It is to make slaves of citizens, to compel them to bear the burthens of war, not for the public interest, but for the mere private advantage of the prince. Injury received is the sole just cause of war. Natural law prohibits killing the innocent, and it is, therefore, unlawful to draw the sword against those who have done us no injury. Victoria omits the consideration of the question, whether God may not have otherwise ordained on some special occasions; for He is the Lord of life and death, and may otherwise dispose in vindication of his own cause. Nor is every degree of injury sufficient to justify a resort to war. As in civil society every crime is not to be visited by the severest punishments, such as death, exile, and confiscation, so neither in the great society of nations is it allowable to resist slight injuries with the slaughter and devastation which war brings in its train.

The fourth question he answers, that it is lawful in

war to do every thing which is necessary for the defence and preservation of the State; it is lawful to recapture things taken by the enemy, or to recover their value, to seize on so much of his property as may be necessary to defray the expenses of the war, and to compensate all damages unjustly sustained. In a just war we may even go farther, and occupy the enemy's territory and his fortresses, so as to punish him for injuries inflicted, and obtain peace and security against his hostile designs.

Such are the belligerent rights incident to a just war. But the author inquires, in order to constitute a just war, is it sufficient that the belligerent believes it to be just? To which he answers, not in all cases. It must be referred to the judgment of wise men to determine whether the war be founded on a just cause. The greatest care and diligence ought to be used in this inquiry, and the reasons urged even by the adverse party ought to be well waged. A war may be just on both sides, each party believing himself to be justified. Even the Turks and Saracens may be said to wage just war against Christians, since they believe that they are thereby serving God. Subjects are not bound to serve their prince in a war manifestly unjust, since no temporal authority can justify us in slaying the innocent. At the same time the duty of examining the question of the justice or injustice of the war devolves principally on the chief men of the nation, who ought to be consulted by the sovereign on such momentous occasion. Those inferior members of the State who are not called to the public council, may lawfully abide by the decision of their superiors as to the justice of the war. In a doubtful case the subjects are bound to obey the orders of their sovereign.

Returning again to the question, what acts of hostility are lawful, he inquires whether it is lawful to kill the innocent? which question he answers in the negative. Women and children are presumed to be innocent even in war against the Turks. The presumption is also extended by the usage among Christians to husbandmen,

and in general to all persons engaged in civil or religious life, and to strangers sojourning in an enemy's country. Still these persons among the enemy may lawfully be despoiled of their goods, such as ships, arms, and money, which are the sinews of war; but if the war may otherwise be prosecuted successfully, the property of husbandmen and other innocent persons ought not to be destroyed or carried away. The property of both innocent and guilty is subject to reprisals in case restitution is refused of things unjustly captured: thus, if French subjects make incursions into Spain and plunder the inhabitants, and redress is refused by the King of France, the Spaniards may, by authority from their prince, despoil innocent French merchants or husbandmen. The letters of marque and reprisal which are granted in such cases are not unjust, since it is owing to the neglect and fault of the other prince that this license is granted to despoil his innocent subjects. But they are perilous and give occasion to indiscriminate plunder.

As it is unlawful to kill children and other innocent persons, so neither is it lawful to carry them into captivity. But in a war against Pagans, which may be said to be perpetual and without hope of obtaining satisfaction, doubtless the women and children of the Saracens taken prisoners may be detained as slaves. By the law of nations prevailing among Christians, it is not lawful to make slaves of captives taken in war, but they may be retained until redeemed by the payment of a ransom which is not to be extended beyond what the necessity of war and the usage of belligerents may require.

Victoria then puts the question, whether hostages for the observance of a truce or other compact between enemies may lawfully be put to death on the infraction of the compact? which he answers by a distinction between the hostages who have borne arms and innocent persons such as women and children. The former may, the latter may not, be put to death in the case supposed. As to the question whether all persons who take arms against us may lawfully be slain, he answers

that in the heat of battle, or in the attack and defence of a besieged place, whilst the conflict is still in *periculo*, all who continue to resist may be put to death.

The only doubt is in the case where victory is already secured, and no danger is to be apprehended from the enemy, whether those who have taken up arms against us may lawfully be slain. This doubt he solves by quoting the command of Jehovah to the Jews, in the twentieth chapter of Deuteronomy, forgetting what he had before said as to such special precepts being applicable only to the particular occasion. Not altogether satisfied with this indiscriminate licence to slaughter enemies no longer resisting, he limits it to the necessity of striking terror into the survivors, and then obtaining security against their hostile designs. He, therefore, concludes that it is not always lawful to slay all who have taken up arms. But this mitigation of the extreme rights of war is not applicable to infidels with whom there can be no hope of obtaining just terms of peace. And he understands the precept in Deuteronomy as being directed against such, so that he at least comes to the conclusion that as between Christian enemies those who no longer resist cannot lawfully be slain, especially as subjects are not bound to inquire minutely into the justice of the war, but may take up arms at the command of their prince, and, therefore, may be considered in this sense as innocent persons. And even though by the law of nature, military persons who surrender or are taken prisoners might lawfully be slain, the usage and custom of war which had become a part of the law of nations had ordained otherwise. But Victoria states that he had never heard that the usage and custom extended to the case of the garrison of a fortified place which surrendered at discretion. Where there is no capitulation expressly securing the lives of the prisoners, they may lawfully be put to death.

As to the question whether things taken in a just war become the property of the captors, he answers, that as the object of such a war is to obtain satisfaction for in-

juries done by the enemy, the things taken from him may be confiscated for that purpose. But it is necessary to distinguish among those things taken in war. These are either movables, such as money, clothing, silver, and gold; or immovables, such as lands, cities, and fortresses. As to movables, they become by the law of nations the property of the captor, even if they exceed in value the amount of the injury inflicted by the enemy.

For this position he cites the l *si quid in bello*, and l *hostes*, ff *de capti*, and c *jus gentium* 1, and Inst *de. rer. divs*, § *itemque ab hostibus*, where it is expressly said, "quod jure gentium quæ ab hostibus capiuntur, statim nostra fiunt." He fortifies the authority of the Roman law in this respect by that of the sacred Scriptures and the writings of the Casuists. Admitting that a captured city may be given up to plunder, he restrains this concession to cases of dire necessity, which can alone justify a resort to this cruel extremity. As to immovables, he states that the lands, cities, and fortresses may be occupied and held until adequate satisfaction is made for the injuries inflicted by the enemy. But the exercise of the right is not to be extended beyond what equity and humanity may justify, in order to obtain indemnity for the past and security for the future. On the settlement of the term of peace, only so much of the enemy's territory can justly be retained as is necessary for these purposes. The right of conquest gives a just title to this extent to the acquisitions made in war, and finally confirmed by the treaty of peace. Contributions may also be levied on the enemy, and that not only to the extent of an adequate indemnity, but by way of punishment proportioned to the offence. In extreme cases where the amount of injury is very great, and no other security can be obtained for the faithful observance of the peace, the existing Government of the conquered country may be subverted and the sovereignty united to that of the conqueror. All these extreme rights of war are to be tempered in their exercise by the consideration that the justice or injustice of the war may be doubtful, and the

enemy's sovereign may act bonâ fide in carrying it on after having carefully examined the question through the investigations of wise and good men.

Victoria concludes this dissertation by laying down three canons or rules of conscience relating to the subject. 1. That the sovereign in whom is vested the right of making war, not only ought not to seek for occasions of hostility, but as far as in him lies to live at peace with all men according to the precept of St. Paul to the Romans; all men being our neighbours, whom we are bound to love in the same degree as ourselves, and inasmuch as we have a common Lord at whose tribunal we must render an account. Nothing, therefore, but the strongest necessity can justify a resort to arms in order to obtain the redress of injuries.

2. War being undertaken for a just cause is to be prosecuted not to the utter destruction of the enemy, but in order to inflict upon him such an amount of evil as may be necessary for the defence of the State and obtaining a secure peace.

3. Victory being once obtained is to be used with moderation and Christian modesty. The conqueror is bound in determining the amount of satisfaction due to his own nation, to consider himself as an impartial judge between the two belligerent States. He is the more bound to this rule of moderation, inasmuch as wars among Christians are generally to be attributed to the misconduct of rulers. Subjects take up arms for their prince, confiding to the justice of his cause, and most unjustly suffer for the faults of their superiors, as says the poet:—

"Quicquid delirant reges, plectuntur Achivi."

Dominic Soto, a Spanish Dominican, and the pupil of Victoria, published his treatise De Justitia et Jure, in 1580. This is characterized by Mr. Hallam as the first original work of any reputation in ethical philosophy since the revival of letters. The laborious folio inspires us with great admiration for the author's zeal; but it is

now forgotten. The following eulogium on Justice gives an idea of his style:—Illustrissima Justitiæ virtus, fidei nostræ legitima proles, spei robur, charitatis pedissequa, cæterarumque virtutum clarissimum jubar, quamcum profana tum cum primis Divina oracula super æthera tollunt: ut pote quæ homines, civile animal, in unum congregat, ab injuriis vindicat, amore conciliat, in pace retinet, virtutibus ornat, ad æternam denique felicitatem divino munere subvehit.[1]

Soto was distinguished for the active part which he took in the Council of Trent. He was consulted by the Emperor Charles V. on the occasion of a conference held before him at Valladolid in 1542, at which Sepulveda appeared as the champion for the Spanish colonists, and the great Las Casas as an advocate for the oppressed American Indians. The opinion of Soto was founded on reason, truth, and the Christian religion,—"Neque discrepantia ut reor est inter Christianos et infideles; quoniam jus gentium cunctis gentibus æquale est." Soto, too, in bold and energetic language, condemned the atrocities of the slave trade.

Amongst the Spanish Doctors of the sixteenth century, not the least was Franciscus Suarez.[2] Grotius says of Suarez that he had hardly an equal, in point of acuteness, amongst philosophers and theologians; and Suarez has had the merit, even in that age, of having clearly observed the distinction between what is commonly called the Law of Nature and the conventional rules of intercourse observed between nations. He first saw, as Sir James Mackintosh has said, that International Law was composed, not only of the simple principles of justice applied to the intercourse between states, but also of those usages long observed in that intercourse by the European race, which have since been more exactly distinguished as the Consuetudinary Law of the Chris-

[1] Soto, b. 1494, d. 1560. Fratris Dominici Soto, Segoviensis, Theologi, ordinis prædicatorum, Cæsareæ Majestatis a sacris confessionibus Salmantini professoris De Justitiâ et Jure, Libri decem. Medina, 1580.

[2] Born 1548, died 1617.

tian Nations of Europe and America. For the basis of his works he took the philosophy of Saint Thomas Aquinas. For him syllogism and authority are always decisive arguments; his principles are elevated and profound; he represents the great traditions of the Middle Ages; he is a worthy disciple of Saint Thomas Aquinas, and is the latest representative of the Scholastic philosophy. The most remarkable work of Suarez is his treatise on Laws, based on the "Laws" of Saint Thomas, whose doctrines in a great measure he reproduces with certain modifications of detail. It is a treatise on Natural Law according to the principles of the philosophy of the Middle Ages. In all the schools there was a treatise on the Just and Right or a treatise on Laws. Suarez has thus composed a considerable book, in which all the opinions of the doctors are collected, condensed, and compared together, so that whoever thoroughly knows the treatise on Laws by Suarez, knows to the bottom all the ethics, all the natural law, and all the politics of the Middle Ages.

The laborious treatise of Suarez, "De Legibus ac Deo Legislatore,"[1] is divided into ten books. It is a digest of all the discussions of the Christian Fathers on the subject of justice, interspersed with numerous illustrations from Plato, Cicero, and other pagan philosophers. In the preface he says the science of Civil Right—Juris Civilis Prudentia—is nothing more than a certain application or extension of moral philosophy to regulate and govern the political morals of the state. In the first book he discusses the nature of Law, and analyzes the divisions and definitions of former authors. Plato, in the Timæus and Phædrus, divided Law into divine, celestial, natural, and human; of which terms the second is not admitted by theologians; either because it is superfluous, or contains an erroneous doctrine. For by the celestial law Plato understood Fate. Now, if he

[1] "Francisci Suarez, Granatensis Doctoris Theologi et in Conimbricencis Academiâ Sacrarum literarum Primarii professoris, Tractatus De Legibus ac Deo Legislatore in decem libros distributus." London, 1579.

understood that this law was such as not to be subject to Divine Providence, or to all things, even to men, to the extent of imposing necessity upon the peculiar operations of the soul, the opinion was false, and contrary to the Divine Government and to Free Will. But if he understood by the celestial law only what Aristotle said —that this inferior world was united with the celestial spheres, and thence governed by natural influences and chances, which always depend from God, and change bodies, not souls, then it is not proper to make such a division; because in this sense it is comprehended under natural law. Omitting, therefore, the second term—celestial—the other three are in use amongst theologians, but in a sense somewhat different.[1] The Divine Law, with Plato, is governing reason existing in the mind of the Universal Deity; which law theologians also acknowledge, but call it the Eternal Law. For the law may be called divine in two ways: in one, because it is in God himself; in the other, because it is promulgated immediately by God himself. Plato used the term Divine Law according to the former sense; but the theologians, with St. Augustine, call it Eternal, to distinguish it from that law which the Deity promulgates.[2] The first division of Law is into temporal and eternal; the next is into natural and positive. This second division is recognised by theologians, and the phrases *lex positiva* and *jus positivum* occur frequently amongst the Fathers. The phrase Natural Law has been used in various ways by philosophers, theologians, and jurists. Plato uses the term Natural Law to include every natural inclination placed in things by their Creator, by means of which they are directed to their peculiar acts and ends. So, according to the Fathers, all things which are governed by Divine Providence participate in some eternal law; whilst, according to the Institutes, natural law is common, not only to men, but also to the other animals. But the proper natural law which pertains to moral philosophy and theology is that which is inherent in the human mind to

[1] Lib. i. cap. 3. sec. 5.

[2] Lib. i. cap. 3. sec. 7.

distinguish the good from the base—"Lex ergo naturalis propria, quæ ad moralem doctrinam et theologiam pertinet, est illa quæ humanæ menti insidet ad discernendum honestum a turpi."[1]

In such a definition of Natural Law Suarez plainly confounds Ethics with Jurisprudence; and implies simply the Moral Sense of right and wrong. Nor is he more correct in his definition of Positive Law, which he states is so called because it is added to Natural Law, and does not necessarily flow from it—Inde enim positiva dicta est, non ex illâ necessario manans.[2] Natural Law is now understood to be the theory of that part of our duties which is capable of being enforced; whilst Positive Law, so called as existing by position, has been shown by Savigny to arise naturally and necessarily from the internal nature of man, and the external circumstances in which he is placed.

In the seventh chapter of the first book it is maintained, and illustrated with numerous authorities, that it is the essence of a law that it be passed for the public good. The second book is entitled "De Lege Æternâ Naturali, ac Jure Gentium." After illustrating further the doctrine that natural law is natural reason, he distinguishes it from conscience. For the law lays down a general rule about actions, but conscience gives a practical dictation in a particular case; whence, rather, it is, as it were, the application of the law to a particular occurrence.[3] According to the Civil Jurists, Jus Naturale is distinguished from the Jus Gentium, inasmuch as the former is common to man with the brutes, but the latter peculiar to man alone. After discussing the various nice distinctions of the theologians, Suarez finally adopts the definition of the Institutes as to the Jus Gentium; and lays down that the Jus Gentium differs in its precepts from the Jus Civile; because it is established not in what is written, but in custom; and not merely that of one state, but of many.[4] He then, in the following noble

[1] Lib. i. cap. 3. sec. 8, 9.
[2] Lib. i. cap. 3. sec. 13.
[3] Lib. ii. cap. 5. sec. 15.
[4] Lib. ii. cap. 18.

language, explains the reason for the Law of Nations: The reason of this law is, that the human race, although divided into various nations and kingdoms, always has some unity, not only specific, but also political and moral, indicated by the natural precept of natural love and charity, which is extended to all, even strangers, of whatsoever nation they may be. Wherefore, although every state, republic, or kingdom, be in itself perfect, nevertheless, each of them is also a member of the universal human race. For these communities are never so self-consistent in themselves as not to stand in need of mutual aid, and alliance, and communication; sometimes for their amelioration and greater advantage, sometimes by moral necessity. Wherefore, they need in some manner to be rightly directed in this species of communication and alliance. And although, in a great measure, this may be done by natural reason, still not sufficiently and immediately for all; and hence special laws have been introduced by the practice of the nations themselves.[1]

The remaining books of the treatise De Legibus are, III. De Lege Positivâ Humanâ; IV. De Lege Positivâ Canonicâ; V. De Varietate Legum Humanarum; VI. De Interpretatione, Mutatione, et Cessatione Legum Humanarum; VII. De Lege non scriptâ, quæ Consuetudo appellatur; VIII. De Lege Humanâ favorabili, seu Privilegio; IX. De Lege Divinâ Positivâ veteri; X. De Lege novâ Divinâ.

In the sixteenth century the doctrine of Tyrannicide appeared in the political writings of all parties. Languet, Buchanan, Bodin, and Mariana, all enforce it as lawful. And the execution of Charles I. appears as the result of the studies of the advanced republicans who lived in that age.

Mariana's[2] book was published in the year 1603, but still has been generally classed amongst the works of the sixteenth century. It commences with an introduction written in imitation of a dialogue of Plato or Cicero. Mariana has described a mountain near Toledo, where, under great trees which the rays of the moon shone

[1] Lib. ii. cap. 19. sec. 9. [2] Mariana, b. at Talavera 1537, d. 1624.

through, he used to repose from the labours of the day with a friend. There they paid homage to God, singing alternately sacred psalms; or distracted their leisure by interesting conversations on letters and philosophy. It was from one of these interviews that the treatise De Rege had its origin.

Mariana, like Bellarmin, is the partizan of the government; but he is also the friend of liberty. He demonstrates the superiority of monarchy; but he develops with all their force the contrary reasons. For the rest, he subordinates monarchy to the power of the people. And when he is asked which is superior to the other, he adopts the principles of Languet and of Bouchier. Mariana does not hesitate to declare the prince is inferior to the state; in other words, that the monarchical power has something beyond it—the people, the nation, society; that there is a sovereign beyond the sovereign; that the authority of kings owes its origin to the people, and is not legitimate without its consent. The government of a family must be distinguished from that of the state. The chief of the family commands slaves; the chief of the state, freemen. It is for the essential interest of the state, for taxes, for the abrogation of laws, for the change in the order of succession, that the will of the people is superior to that of the prince. There is another and a graver reason: the republic must always reserve the right of punishing a wicked prince. But if the people were completely despoiled, what resources would they have to overwhelm a tyrant who dishonoured them by his vices? One chastisement is necessary for perverse princes—this is, tyrannicide. A tyrant is a public enemy; he must be treated as an implacable enemy. If such an action were criminal, the human race would hold in horror the names of those, who, at the peril of their lives, saved liberty, and delivered their country from their oppressors. On the contrary, the names of Harmodius, Aristogiton, and Brutus, have always been cited with honour. From the admission of all philosophers, the right to assassinate a tyrant is not doubtful, when he has acquired the empire

by violence; then this right belongs to an individual person, without any deliberation of the citizens. But if the throne is in the hands of a prince, caution is required, and we must hesitate to drive him from it rashly; we must try at first to correct him, but if he resists all remonstrances, the republic or the people has the right of taking power from him, of proclaiming him a public enemy, of declaring war against him, and finally putting him to death; and once war is declared, the right of executing the sentence belongs to every private individual who does not fear, at the risk of his life, to save the state. In default of the legal meeting of the assemblies of the people, the people can and ought themselves rise against the tyrant; and the right of life and death belongs to them always; only it is not the province of a private individual to decide if the prince be a tyrant, but it is suitable to wait for the decision of grave and wise men, at least as long as the public voice is not pronounced. Thus the right to kill a tyrant is absolute. Finally, Mariana decides it is not lawful to use poison.

5. Besides the works connected with the casuistry of the schoolmen, numbers of practical treatises were also published in the sixteenth century by Spanish and Italian writers. Spain, under Charles V. and Philip II., was the first military and political power in Europe maintaining large armies and carrying on long wars. Spain was also the first nation that felt the want of that more practical part of the law of nations, which reduces war to some regularity. Among the earliest of these works is a treatise by Balthazar Ayala,[1] Judge-Advocate to the Spanish army in the Netherlands, under the Prince of Parma, in 1581. This work is divided into three books, the second of which relates exclusively to military policy, and the third to martial law. In the first the author treats of the laws of war as a branch of the law of nations, with

[1] Balthazar Ayala, b. 1548, d. 1584. Balth. Ayalæ, J. C. et exercitus regii apud Belgas supremi Juridici, de Jure et Officiis bellicis et Disciplina militari, libri tres. Antw. 1597, 12mo, pp. 465. Hallam's Literature of Europe, Part II. cap. iv. Wheaton's Law of Nations. The analysis is taken from Wheaton.

a continual reference to examples drawn from Roman law and Roman history. The first chapter expounds the received forms of declaring war, and other belligerent ceremonies, which the author deduces from the Roman fecial law, and without the observance of which no war was deemed just by that people. The second chapter treats of the just causes of war. Ayala concurs with Victoria in attributing the authority of declaring and carrying on war to the supreme power of the state. War is just when undertaken for the power of the state, its subjects, its property, its allies, and for the recovery of persons or things unjustly taken by the enemy. Neither rebels nor pirates are considered as public enemies; they are not entitled to the rights of war in respect to captures and postliminium; property in things taken by them is not lost to the original owners; but things taken from them become the property of the captors, as if taken from a public enemy.

In all these cases the subject is bound to submit his judgment to that of the sovereign, who alone is responsible for the justice or injustice of the war. A war may be just in a legal sense, even when not founded on a just cause, since there is no sovereign arbiter between states. That war may be called just which is declared and carried on by the lawful war-making power. Thus, Ulpian says: "Hostes sunt quibus publice populus Romanus bellum decrevit, vel ipsi populo Romano ceteri vero latrunculi vel predones appellantur." A war thus declared entitles both belligerent parties to all the rights of war.

The third chapter contains a digression upon duels or private combats, which the author condemns as a violation of all laws, human and divine. The fourth treats of reprisals against the property of the offending nation, which can only be granted by the supreme authority of the state in which the war-making power is vested. The fifth chapter treats of things taken in war, and of the jus postliminii. Things taken from the enemy in a just war become the property of the captors. But a distinc-

tion is to be made between movables and immovables, such as lands and houses, which last are confiscated to the use of the state. And by the laws of Spain, not only lands and houses, but ships of war taken from the enemy, become the property of the crown. Even as to other movables, the right of the captors to appropriate them as booty is restrained by that of the state to regulate the division, reserving to itself a certain share, and distributing the rest according to the respective rank of the captors. Ayala cites the texts of the Roman law, showing that not only things, but persons, taken in war, become the property of the captors, and that slavery, which did not exist by the law of nature, was thus introduced through the law of nations. Among Christian nations, however, an ancient and laudable custom had substituted the practice of ransoming prisoners of war for that of making them slaves. The more ancient usage of reducing prisoners of war to servitude still subsisted at the time when he wrote as between Christian and infidel nations, such as the Turks and Saracens. Persons reduced to slavery in this manner recover their liberty on their return to their own country jure postliminii. The original owner is likewise entitled to the restitution of lands and other immovable property from which the enemy is expelled. The same legal fiction is also applicable to the case of ships and other movables recaptured from the enemy. As to these last, our author adopts the distinction of Labeo,—"Si quid bello captum est in præda est, nec postliminio redit." Such movables as are recaptured before they have been carried intra præsidia hostium, are consequently to be restored to the original proprietor, because they have not been appropriated as booty. Things recaptured from pirates are to be restored, whether they have been carried intra præsidia or not, because a capture by them is wholly void.

The sixth chapter relates to the duty of keeping faith with enemies. This duty is enforced, as usual, by examples taken from Roman history and the precepts of Roman philosophers, such as Cicero, Seneca, and others, who

taught that the performance of contracts made with an enemy was not to be eluded under the pretext of duress, or by subtle interpretation of the words, in order to defeat the real intention of the parties. Such was the quibble of Q. Fabius Labeo, by whom Antiochus, having been defeated, had stipulated to deliver up half his fleet, which treaty the Roman general executed by sawing each galley in halves, and thus depriving the king of the whole navy. So also the Romans destroyed Carthage, which they had stipulated to preserve, alleging that the promise was to spare the citizens, not the city.

Our author also mentions the case of the ten Romans captured by Hannibal at the battle of Cannæ, and sent to Rome to negotiate an exchange of prisoners, under a promise confirmed by oath to return if they failed in effecting that object. One of them sought to elude his engagement by going back to the Carthagenian camp under pretext of having forgotten something, and then pursued his way to Rome. According to Polybius, the senate ordered him to be bound and delivered up to Hannibal; for as Cicero justly observes, "Fraud does not absolve, but only aggravates perjury."

What has been said refers only to public enemies engaging in lawful war, and not to pirates and robbers, with whom there can be neither faith nor compact. This brings him to consider the nicer case of compacts with rebels, which, as might naturally be expected from a Spanish civilian writing in the camp of the Prince of Parma in the Netherlands, he declares to be absolutely void, as well as those made with tyrants; by which term he means usurpers, since he had before enforced the duty of passive obedience to lawful princes, however cruel and oppressive their conduct. Promises extorted by tyrants are not binding, since they lack the essential ingredient of free consent. The same may be said of those compacts which a people in rebellion unjustly extort from their prince. Nor is faith to be kept with public enemies in all cases; that is to say, in those cases referred to by Cicero, where the circumstances have so changed

that the performance of the promise would be injurious to the party to whom it is made; as where it is contrary to the divine law, or where made by an unauthorized individual to the prejudice of the state, or where the enemy himself is guilty of a breach of faith. It is not lawful to avenge perfidy by perfidy, but a convention, whether of alliance, peace, or truce, which is infected by fraud, is void ab initio.

The seventh chapter relates to treaties and conventions. These were stated by the Roman ambassadors to Antiochus to be of three kinds:—1st. Where the victorious party dictates laws to the conquered people, of which there are so many examples in the Roman history. 2nd. Treaties of peace and friendship founded on the basis of equal reciprocity, such as that concluded between the Romans and Sabines. 3rd. Treaties of friendship and alliance between nations who had never been engaged in war with each other. This class may again be divided into treaties of defensive alliance, and those which are both offensive and defensive. To these may also be added treaties of commerce. Our author here explains the difference between a fœdus and a sponsio, according to the Roman law. The commander of an army has power to make a temporary truce, but not a perpetual peace, without special authority from his sovereign.

The eighth chapter treats of stratagems and frauds in war. It is allowable to attack an enemy by force or fraud, and any kind of deceit or stratagem may be practised against him provided good faith is observed in respect to the performance of promises. The Greeks and Carthagenians boasted of their skill in deceiving the enemy; but the Romans, in the earlier days of the Republic, magnanimously disdained such acts. If they subsequently adopted them, it was not without strong opposition on the part of those senators who appealed to the better example of their ancestors.

The ninth chapter concerns the rights of legation. Our author asserts that the character of ambassadors had ever been considered sacred and inviolable among all

nations, and quotes several examples where the judgment of the fecial college determined the Romans to deliver up to the enemy those who had violated the jus gentium in this respect. He refers to the conduct of the Dictator Posthumius, who carried his scruples so far as to liberate certain Volscians who had been clothed with the office of legati in order to mask their real character of spies who came to examine the Roman camp. But Ayala doubts whether the immunity of ambassadors extends to a case where they act in a manner so inconsistent with their official character.

The rights of legation belong only to public enemies, not to pirates, robbers, and rebels. Traitors who take refuge in the enemy's country cannot protect themselves by assuming the character of ambassadors. Our author applies this to the famous case of the ambassadors of Francis I., native subjects of Charles V., who were assassinated on their way through the Milanese to Venice and Turkey, and whose murderers the emperor refused to deliver up.

6. Albericus Gentilis[1] was born in the March of Ancona about the year 1551, of an ancient and illustrious family. He was an Italian Protestant, who, through the influence of the Earl of Leicester, was elected to fill the chair of Civil Law at the University of Oxford in 1582. He did not confine his attention to the Roman law, the only system then thought worthy of being taught in a scientific manner, but investigated the principles of natural Jurisprudence and of the consuetudinary law governing the intercourse of Christian nations. His attention was especially directed to this last by the circumstance of his being retained as the advocate of Spanish claimants in the English prize courts. The fruits of his professional labours were given to the world in the earliest reports of judicial decisions on maritime law published in any part of Europe.[2] His more scholastic and academical studies produced one of the earliest regular treatises

[1] B. 1551, d. 1611. De Jure Belli Libri tres. Hanau, 1589; ibid. 1612.
[2] De Advocatione Hispanica. Hanau, 1613.

upon the laws of war—De Jure Belli—published in 1589, and dedicated to the Earl of Essex. Grotius acknowledges his obligations to Gentilis, and Mr. Hallam remarks, "that this comparatively obscure writer was of some use to the eminent founder, as he has been deemed, of international Jurisprudence, were it only for mapping his subject, will be evident from the titles of his chapters which run almost parallel to those of the first and third books of Grotius." His title to be considered as the father of the modern science of public law, is asserted by his countryman Lampredi: "He first explained the rules of war and peace, which probably suggested to Grotius the idea of writing his own work; worthy to be remembered, among other things, for having contributed to augment the glory of his native Italy, whence he drew his knowledge of the Roman law, and proved her to be the earliest teacher of natural Jurisprudence, as she had been the restorer and pâtroness of all liberal arts and learning."

Gentilis also published, in 1583, a treatise on embassies—De Legationibus—which he dedicated to his friend and patron, Sir Philip Sydney. The first book of this work contains a historical deduction as to the origin of the different kinds of embassies, and the ceremonies anciently connected with them by the Roman fecial law. The second book treats more specially of the rights and immunities of public ministers. He examines the question, whether they are entitled to a privileged character in respect to any other power than that to which they may be accredited. In strict law he concludes they are not; but it ought to be considered that ambassadors are the ministers of peace representing the person of their sovereign, charged with the business of the state, and universally considered, even by enemies, as possessing a sacred and inviolable character. The rights of legation do not extend to pirates and rebels; such criminal associations of men do not constitute a state; they are not public enemies. The case of a civil war is more doubtful. Here both parties claim to be the state, and each treats its ad-

versary as guilty of treasonable resistance. The question must depend upon the respective factions being so evenly balanced as to make it for the interest of each to treat the other as if entitled to all the rights of public war. Whatever may be the effect of civil dissensions, difference of religion, at least, cannot be held to deprive the respective parties of the rights of legation. They may affect to treat each other as heretics and schismatics, but they are not therefore absolved from the obligations of public law. The immunity of the ambassador from the local jurisdiction of the country where he resides extends to the persons of his suite, to his property, and to his dwelling. But Gentilis very inconsistently holds that the ambassador is subject to the ordinary jurisdiction of the civil tribunals of the place where he resides in respect to contracts made during the continuance of the embassy. This anomalous opinion is not confirmed by any other public jurist, and appears to be founded upon a misapplication of the Roman law, in respect to the legatus representing his province or city at the capital of the empire, or the legatus sent from Rome into the provinces on a special mission, who, of course, would be amenable as a subject to the local tribunals of the place where he temporarily resided, and where the contract was made. Yet, he not very consistently maintains that a foreign ambassador cannot be punished by the tribunals of the state where he resides for a crime committed by him, but even in the case of a conspiracy against the government must be sent out of the country.[1]

The third book relates almost exclusively to the qualifications required in a good ambassador, which, according to our author, are almost as numerous as those required by Cicero to form his perfect orator. Besides the gifts of natural genius and peculiar aptitudes for this vocation, Gentilis requires eloquence, an extensive knowledge of history and political philosophy, dignity of manners, and high courtly breeding, temperance, fortitude, prudence, and a sacred regard to truth and rec-

[1] Lib. ii. c. 3–18.

titude; in short, all those attainments, qualities, and virtues, which, according to him, were found united in his illustrious friend and patron, Sir Philip Sydney.[1]

From what has been shown of the discoveries of Suarez and Gentilis, it will have been seen that Grotius has no right to be considered as the inventor of the science of International Law.

7. In the cultivation of the Civil Law France took decidedly the lead for nearly two centuries, until she found a rival in Holland. The Dutch School may be considered to have commenced with the founding of the University of Leyden in 1575, to which place Donellus was invited about that time, he being obliged to leave France on account of having embraced the Protestant religion. It was he who gave the first great impulse to the study of the Civil Law in Holland. Other universities were subsequently founded, each of which had its law professors. Grotius and Vinnius flourished about the middle of the seventeenth century, Van Leeuwen and Huber towards its close. In the following century we have the names of Voet, Westenberg, Schulting, Noodt, and Bynkershoek. These raised the reputation of the Dutch schools so high that students in general repaired to Leyden and Utrecht, instead of to Bourges and Toulouse. In the political changes and revolutions which afterwards took place, the universities and law schools of Holland suffered, and though these afterwards partially recovered, Holland has not regained its former position. It has now a respectable school of law, but it cannot pretend to vie with the schools of Germany.

Zasius was the founder of the German School. For a long time the voluminous works of the civilians of that country were extremely heavy and barbarous in their style, though exhibiting much industry and research. Halvander, who died in 1531, is one of the first names really deserving of notice. He was distinguished chiefly for his learned edition of the Corpus Juris Civilis, in which the Greek novels, hitherto known through a Latin

[1] This analysis is taken from Wheaton.

translation, were for the first time given in the original. During the latter part of the same century many professors of distinguished merit appeared. Most of them however were foreigners, as Giphanius, "the boast of Germany," Donellus, already noticed as adorning the Jurisprudence of France and Holland, Balduinus and Gothofredus the elder, whose edition of the Corpus Juris Civilis makes an epoch in Jurisprudence, it being the text-book generally received. In the seventeenth century this school degenerated, but towards the close of the same century the historical study of the Roman law began to make progress. The most conspicuous German civilian of the eighteenth century was Heineccus, whom Sir James Mackintosh designates as the best writer of elementary books with whom he was acquainted, on any subject. At present Germany is unrivalled in this branch of learning. A new school of historical Jurisprudence, founded several years ago by Professor Hugo, has firmly established itself there, and is extending its branches to other countries. A conspicuous ornament of the same school, Haubold, died a few years ago. The works of these two authors are extremely valuable. But the acknowledged chief of the historical school of Jurisprudence is Savigny, of Berlin, the learned historian of the Roman law. The field of historical Jurisprudence is comparatively new, for none of the French Cujacian school undertook a work strictly historical, unless Gruchy and a few others can be considered as exceptions. And although something was formerly done in Germany and Italy in this department of knowledge, much yet remains to be explored.[1]

[1] Donellus (Hugues Doneau), b. 1527, d. 1591: Commentaria Juris Civilis, 4 vols. Nuremberg, 1801–1808. Vinnius, b. 1588, d. 1637, Professor at Leyden: Institutionum Imperialium Commentarius. Amsterdam, Elzevir, 1665. Paul Voet, b. 1619, d. 1677, Professor at Utrecht: Commentarius in Pandectas. Leyden, 1698, 2 vols. fol. Zasius, b. at Constance 1461, d. 1535, Professor at Fribourg, in Brisgau: works, 6 vols. fol. Lyons, 1550; Frankfort, 1590. Gothofredus (Denis Godefroi), b. 1549, d. 1622: Corpus Juris Civilis. Lyons, 1585; Elzevir, 1683. Heineccius, b. 1681, d. 1741, Professor at Halle and Frankfort-on-the-Oder: Elementa Juris Civilis Secundum Ordinem Pandectarum. Frankfort, 1748: works, 8 vols. 4to. Geneva, 1744. This section is taken from Jebb's Principles of Law: Encyc. Met.

8. Bodin, 1550–1627.

Joan. Bodini Andegavensis De Republicâ libri sex Latinè ab auctore redditi, multo quam antea locupletiores, cum indice copiosissimo. Lugduni, 1586; Frankfort, 1591. (Translated into English by Knolles). J. Bodin et son temps par Baudrillart: Paris, Guillaumin, 1853. Thierry: Introduction aux documents inedits pour l'histoire du Tiers-etat. Bayle's Dictionary, Art. Bodin.

Among the political writers of the sixteenth century Bodin, although now almost unknown, is confessedly the first, both in the elucidation of correct principles, and the honest boldness with which he states them. Machiavelli scientifically analyzed villany. Sir Thomas More was afraid to state his political opinions except under the veil of a fable. Of Bodin, Dugald Stewart has said, "I know of no political writer of the same period whose extensive, and various, and discriminating reading appear to me to have contributed more to facilitate and guide the researches of his successors, or whose references to ancient learning have been more frequently transcribed without acknowledgment." The Republic of Bodin was originally published in French in 1577. It was afterwards enlarged by himself, and published in Latin in 1586.

Bodin himself indicates in his preface the object which he proposes in writing the Six Books of the Republic. This object is two-fold, practical and theoretical. In the former, he seeks to defend the principle of authority so strongly shaken by the civil wars; in the latter, he endeavours to point out the functions of the State—to determine its ideal. He proceeds farther, he wishes to write a treatise embracing all political science, with the different orders of facts which it comprehends, and with the laws which preside over it. He cites ancient writers, not as authorities, but on account of the truth to be found in them—to enlighten his work by their reasoning and examples. He reproves those who have discoursed upon politics without possessing a knowledge of the laws—never himself separating the historian, the philosopher, and the lawyer. To write upon matters of state with-

out an acquaintance with public law, he pronounces to be a profanation of the mysteries of political philosophy—profaner les mystères de la philosophie politique.[1]

Machiavelli is the adversary almost always present to Bodin; it is against him that he has written, even more than against the anti-monarchical pamphleteers. Bodin refuses to separate Morals from Politics. And on the subject of the great idea of Justice, the author of the Republic opposes Plato to Machiavelli, as, upon the other questions, he opposes the practical wisdom of Aristotle to the Platonic speculations. He declares that he pursues a double war—one against political immorality serving as a cloak to tyranny; the other against anarchy, placing itself under the invocation of Eternal Right. The first chapter of the De Republicâ is entitled, "Quis optimus sit Reipublicæ finis." A state is defined to be a number of families, and of the things common amongst them, governed by supreme power and reason. And the end of government is the greatest good of every citizen. The words Republic and State are used as synonymes by Bodin. The state for him signifies the sovereign power with the fundamental law which serves as its rule, and with the different powers which emanate from it. The sense of the word republic is more extended in containing and recalling, in a manner, more immediate the idea of society and of community (res publica). La Republique est un droit gouvernement de plusieurs ménages et de ce qui leur est commun avec puissance souveraine. Upon this definition he builds his system. He uses the expression "droit gouvernement" to distinguish republics or societies from bands of robbers and pirates, who possess governments, but governments whose object is the destruction of justice.

The good—le bonheur—is not the sole, or even the principal end of the well-ordered republic, according to Bodin. It is in this respect that the definitions of Aristotle, and almost all the ancient definitions, appear to him faulty and incomplete. He would not fashion a

[1] Cap. i.

republic in idea and without effect, such as Plato and Sir Thomas More have imagined. The Republic of Boden is the first sincere effort of an alliance between idea and fact—between the rational and experimental methods.

Bodin, in his preface, founds the state upon justice. His principle is the identity of nature, and of the end of man and the state. The sovereign good of the one is consequently the sovereign good of the other. He places the sovereign good of man in contemplation and action, which relate to the soul and the body. The good of the body consists in the health, strength, beauty, and proportion of the members; the good of the soul, in the moral virtues, in the intellectual faculties. The Republic of Bodin has a body and a soul, it acts and contemplates, it pursues a material destiny, and a moral end. Its body is its territory, more or less fertile—its good is composed of the natural advantages, such as a good climate, soil, position. The good—les bons—of the soul is the chief end of society, which cannot be developed without a previous security, and a certain satisfaction of the body's wants. Bodin concludes by affirming that the more republics, once their first wants have been satisfied and secured, will advance in their moral and intellectual development, the nearer they will approach the ideal, and will consequently become well constituted—bien ordonnées. Bodin, in his moral philosophy, follows Plato, as in politics he prefers Aristotle. The ancients defined a Republic as a society of men assembled together to live well and happily. But the word happily is unnecessary, for a Republic may be well ruled and yet afflicted with poverty, abandoned by friends, beset by enemies.

He next treats of the Family. If the end of society is the inquiry after the good, its rule is justice, its foundation is the family which Bodin regards as the true source and origin of every republic. The family appeared to him a state in miniature—en abrégé. Bodin considers as necessary to constitute a family, the head of the

family, the mistress, children, and servants, whether slaves or free. Three families suffice to form a Republic. The totality of families constitute the people. The object of sovereign power is to unite ; in it reposes the unity of nations, as the succession of families creates their perpetuity. Familia est plurium sub unius ac ejusdem patrisfamilias imperium subditorum, earumque rerum quæ ipsius propria sunt recta moderatio. The family is the beginning and rudiment of the state. Bodin upholds the patriarchal authority, both mental and paternal, with a high hand. "The true discipline," he says, "of the father and children depends on the paternal power, which either nature or God himself hath given to every one over his children. The word power is common to all who have either publicly or privately the right of government. 'A prince,' says Seneca, 'has power over his subjects; a magistrate over citizens ; a father over children; a schoolmaster over scholars; a general over soldiers; a master over slaves.' But out of all these the right of government has been given by nature to none except to the father."

Bodin then proceeds to refute communism : for, if the family and the city—things private and public, the common and particular—are confounded, there can exist neither state or family. There must, however, be some things common to the state, as the public demesnes and treasure.

Persons and things used in common will be less carefully treated, because love, shared amongst a variety of persons or things, loses in intensity and purity. However, it never has received a complete application, as it is so repugnant to human nature. To the family should be left as much liberty as is compatible with the laws made with a view to common right. The individual makes part of the general good. The authorities which he cites to establish the divine and human authority of the husband over the wife, of the father over his children, are, the Bible, ancient philosophy, the Roman law, the traditions of all peoples. The command over the family

is divided into four principal branches: that of the husband over the wife; of the father over his children; of the master over his slaves; of the master over his servants. He regards divorce as a barrier against the passions and the crimes which concern the family. He claims for the father the right of life and death over his children. He does not admit what we call the right of the children to the inheritance.

In the fifth chapter is discussed the question, "An servitia ferenda sint in republicâ bene constitutâ?" This is illustrated with much learning; but he comes to no very exact conclusion. "In whatever places slaves may exist, they ought not to be manumitted at once and together; but this must be done by degrees, and a commencement must be made with those who have learned in mature age some art by which they can support themselves. Otherwise they must perish, as befell those whom the Emperor Charles V. commanded to be manumitted at once in Spain."

This observation would be usefully borne in mind by those who advocate the immediate emancipation of the slaves in the United States of North America. There can be no doubt but that the sudden change from slavery to freedom of those unhappy negroes would be accompanied with most disastrous consequences to themselves, and to the countries where they are located. In the enfranchisement of the negroes, it appears necessary to consult the historical example of the abolishment of slavery in Western Europe. The first step was to make the slaves bound to the estates upon which they were born: they became adscripti glebæ. By this, one of the most harrowing evils of slavery, the separation of families, with its consequent demoralization of mind and body, was, in a measure, prevented. Besides, the slave resident on the estate, or in the house, was entitled to acquire and secrete a small portion of property, which finally became legally his own under the name of peculium. And lastly, the masters, in the course of time, became imbued with somewhat more kindly feelings towards those

whose ancestors had laboured on the same property, increasing its fruits for a number of years. These three circumstances arising directly from the fixing the slaves upon the estates where they were born, together with the doctrine preached by the Catholic Church, that all men were equal in the sight of God, are the principal elements in the abolition of slavery through Europe.

In the conclusion of the chapter, Bodin says, that if it be true there is always room for the Divine Law, and that it is not confined within the boundaries of Palestine, why should not that law, so usefully and wisely promulgated by God, concerning slavery and liberty, prevail rather than the laws excogitated by the minds of men?[1]

In this chapter Bodin, following Aristotle, regards servitude as a constituent element of the family. He considers the question under two points of view : as to its justice, as to its utility. With respect to slaves, there are two difficulties which have not yet been solved. The first is to determine if the servitude of slaves is natural and useful, or against nature ; the second, what power the master ought to have over the slave. To say that there is a praiseworthy charity in preserving the life of a wounded prisoner, which is considered by some to be the origin of slavery, is to say that it is the charity of robbers or pirates who boast in having given life to those whom they have not killed. He asks is it pity which preserves captives for the purpose of making a profit by them as with beasts. His servitude can never be useful to the slave ; in all cases it is prejudicial to him, without being ever to his advantage, a circumstance opposed to the fundamental principle of every society. Nor is its universality any argument in its favour ; nor its mildness. Bodin considers that it was fear which principally led to the emancipation of the slaves in Modern Europe. In 1250 the last traces of slavery disappeared in Italy. He concludes by saying that moral law and reason demand as much as utility the freedom of the slave. As to the means, he recommends a previous instruc-

[1] Cap. v.

tion in some trade or other before at once emancipating them.

The sixth chapter discusses the Citizen. "Est autem civis nihil aliud quam liber homo, qui summæ alterius potestati obligatur."[1] For before any citizen or form of state existed, every father of a family had supreme power of life and death over his children and wife. But after that violence, and ambition, and avarice, and revenge, had supplied them with arms against one another, the issues of wars made the conquerors enslave the conquered. And he who had fought bravely as a general, governed not only his family, but also his enemies, as well as his companions; but the latter as friends, the former as slaves. Then that full and complete liberty given by nature to every man, to live as he pleased, was altogether taken from the vanquished, and even lessened to the conquerors, by him whom they had chosen as their leader; because it was necessary for each man, in private, to acknowledge the supreme authority of another. Hence was the first origin of slavery and subjects, of citizens and strangers, of prince and tyrant. To this conclusion reason itself conducts us, that empires and commonwealths were first united by force, even if we were deserted by history.[2]

The second book treats of the different species of government in a state. These are Monarchy, Aristocracy, and Democracy. "Rex est qui in summâ potestate constitutus naturæ legibus non minus obsequentem se præbet, quam sibi subditos quorum libertatem ac rerum dominium æque ac sua tuetur fore confidit."[3] This definition is defective, in making no distinction between monarchy and tyranny, inasmuch as Bodin thus places no restraint upon the will of the Prince. "Aristocratia Reipublicæ forma quædam est in quâ minor pars civium in universos ac singulos cives summæ potestatis jus habet."[4] This definition is also erroneous. It arises from the principle of the division of labour, that a small

[1] Cap. vi.
[2] Cap. vi.
[3] Lib. ii. cap. iii.
[4] Lib. ii. cap. vi.

number of the citizens must exercise the functions of the government. But perhaps Bodin intended to define that state in which the majority were without political rights. 'Respublica popularis est, in quâ cives universi, aut maxima pars civium, cæteris omnibus non tantum singulatim, sed etiam simul coacervatis et collectis, imperandi jus habent."[1]

The third book is principally on Councils of State and Magistrates. The first chapter of the fourth book is entitled "De Ortu, Incremento, Statu, Conversione, Inclinatione, Occasu Rerum Publicarum." A revolution ensues when the form of polity is changed; but this ensues when the popular power is transferred to one, or the power of the law to all citizens. The power of the people goes to the aristocracy either when the strength of the commonwealth has been crushed by enemies, or on the slaughter of a great army of citizens; but, on the other hand, the popular power receives a great increase when victory has been obtained. Often, however, the popular power changes into monarchy; and this most frequently from civil sedition, or if unbounded authority be given to the supreme magistrate. Cicero says, "Ex victoria cum multa, tum certe tyrannis exsistit." On the other hand, tyrannies frequently end in popular states; because the people who cannot endure moderation, when the tyrant is once removed, desiring to communicate supreme power to all, pursue all the friends of the tyrant with such hatred as to desire to leave not one. Hence are the destructions, exiles, proscriptions of the nobles. But aristocratic states cannot be changed into popular without external or domestic violence. However, the popular authority is often transferred quietly to the nobles. And this happens in two ways: either when humble rustics, workmen, or merchants, intent on their domestic affairs, spontaneously abandon public business; or when the number of citizens having been diminished by pestilence or war, the number of strangers to whom residence is permitted with-

[1] Lib. ii. cap. vii.

out the right of suffrage or government is increased. But this is most to be feared in an aristocratic government when the plebeians are excluded from all honours and offices; which, although it is difficult to bear with content, still must be borne if the reins of power be given to the best; but when they are given to wicked and unworthy men, each one the boldest will seduce, on opportunity, the people from the aristocracy; and this the more easily the less the aristocracy are unanimous amongst themselves, which is dangerous to all states, but mostly to an aristocracy.

Chapter V. is on the State and the City. The citizen is, as it were, a subject; he pays obedience to a power which has been in almost all cases established by conquest or violence. The citizen is a free man obedient to the sovereign power. Several citizens, natural or naturalized, or enfranchised slaves, constitute a republic when governed by the sovereign power of one or more rulers. Aristotle considers that to entitle a man to citizenship, he must be qualified to take part in the making of, or carrying into execution the laws of the city. The idea of sovereignty forms, as it were, the keystone in the political system of Bodin.

Chapter VI. is on Sovereignty. One of the characters of sovereignty with Bodin is permanence or perpetuity. It does not consist in absolute power, such as has been vested in a dictator for a stated period. This is simply a commission. The people or rulers of a republic can bestow or transmit, simply and purely, the sovereign and perpetual power to any one. Limits are placed to sovereignty. The prince should scrupulously observe his engagements; should not capriciously change laws; individual property should be maintained—Si la justice est la fin de la loi, la loi l'œuvre du prince, le prince est l'image de Dieu; il faut, par même suite de raison, que la loi du prince soit faite au modèle de la loi de Dieu. The first mark of sovereignty is the power of giving law to all in general, and to each in particular. Ancillary to this the law can put an end to custom. The other indica-

tions are the power of making war and peace; the power of appointing the chief officers; the power of pardoning those condemned by the laws.

Chapter VII. is concerning the forms of the State. The sovereign power may reside in a single prince, in an aristocracy, or in the entire people, or in a body composed of the first three. Lawful monarchy—loyale ou legitime—is that in which the subjects obey the laws of the monarch, and the monarch the laws of nature. Feudal monarchy—seigneuriale—is that in which the prince is made master of the lives and properties of a people by the right of arms and conquest—governing his subjects as a good father his slaves. Despotic monarchy—tyrannique—is that in which the monarch, contemning the laws of nature, abuses the free persons as if they were slaves; abuses the property of his subjects as his own. The prince is not born a legitimate king; he becomes such; it is a quality which he acquires, not a gift of nature.

Aristocracy may be feudal, legitimate, or factious—seigneuriale, legitime, ou factieuse. The German Empire Bodin asserts to be a great aristocracy, though generally considered as a monarchy.

Chapter XI. is on the Senate and Parliament. The senate is the legitimate assembly of the councillors of the state, in order to give advice to those who possess the sovereign power in every republic. Age and experience are the qualities required in the composition of the senate, as well as sound judgment and counsel. The right of proposing ought to belong to each member, with a complete independence. He considers the office should continue for life.

Chapter XII. is on the office of Magistrate in its relation with the ruling and the ruled. A magistrate is an officer who has the power of commanding in the state. An officer is a public person who has an ordinary charge limited by law. The magistrate should cause the enormity of offences to be understood, in order that the guilty may perceive what they have merited, so as to induce them to repentance; and, in doing this, the penalty has

less of bitterness, and more of profit. There are three ranks of magistrates. The first recognise only the supreme majesty; the second obey the one and command the other; the last have command only over particular subjects. In the presence of the sovereign the whole power of the magistrate is held in complete subjection.

Chapter XIV. is on the Theory of Revolutions. The essence of a revolution consists in a change or displacing of sovereignty. The causes of revolutions are a contest arising between the claimants on the failure of the posterity of the princes, inequalities in wealth, oppression, ambition of a commander, alterations in laws. The first monarchies had their origin in violence. In the hereditary descent of monarchies there is an advantage which contributes to preserve monarchies from revolutions, which is, that the people have a certain inclination which induces them to respect, even in wicked princes, the virtue which shone in their ancestors. Revolutions in aristocratic and popular states could be prevented by abstaining from giving to the same man, with the supreme dignity, the supreme command. Sedition or division amongst its leading men is the great bane of an aristocracy. The admission of unworthy men into high offices has more than once caused a revolution in an aristocracy. The same consequence arises from the banishment of some powerful citizen. Another cause of revolution, already noticed by Aristotle, is the absence of a middle class, whose presence is necessary in all well established states. Changes of government are most desirable when least felt. The change which goes on gradually is more tolerable, whether it be from evil to good, or good to better. This analysis of political causes incentive to revolution, leads Bodin to treat of the means of obviating them. In theory, as in practice, Bodin declares in favour of monarchy, though he wishes to see existing governments modified, rectified, and purified. The natural causes of revolutions are human liberty—the action of Providence—the world itself. By wisdom and prudence, which God has given to men, revolutions

can be avoided. Changes in the state or laws should never be made all at once, but slowly, conformably to nature in her marvellous works. The first rule for maintaining states is to well understand the nature of the state, and the causes of the maladies peculiar to it. If it be dangerous to change laws frequently, it is in like manner dangerous to change magistrates, whose appointments should continue for life. The first point which ought to influence legislators is to place conditions, offices, and all other rewards of virtue, in public view, and to share them amongst the subjects according to the merits of each; this cannot be done by bestowing them in perpetuity. He who distributes honours and offices amongst a small number of individuals, which is inevitable when they are conferred for life, kindles jealousies in one towards another. Another objection to the irremovability of magistrates is the impunity acquired by any holding office for life. This question, respecting the duration of office, depends almost entirely upon the form of the state. It is a question whether influence, authority, respect, which the people ought to possess for their magistrates, are reconcilable with a short duration of office.

In order to assure the good order of the state; in order to prevent the revolutions which threaten to overthrow it, a harmonious concord amongst the magistrates appears an indispensable condition. One of the causes of the inferiority of democracy and aristocracy is that the contending factions have no intervening party to reconcile them. The inducing principles of revolution are not pure accidents; they are connected with the profoundest political and social causes. He proceeds to enumerate some of them:—The denial of justice; oppression of the vulgar; the unequal distribution of penalties and rewards; the excessive wealth of a few; the extreme poverty of the many; the too great indolence of the subjects; impunity for crime. Faith is the best foundation for a republic. The object of Bodin in this chapter is to reform the society and the state, to infuse more of reason, more of

justice, into some of the essential laws, to prevent inequality from advancing to an excessive degree.

Chapter XV. is on the Theory of Climate. It is indisputable that the economical progress of a nation depends not only upon the resources presented by the climate, but by the wants which it calls forth, and the efforts which it demands. Bodin naturally prefers middle and temperate regions, the advantages of which he points out. His maxim on this question is that "the good architect accommodates his building to the nature of the material which he meets upon the place." The people of the south are subject, so far as the body is concerned, to great maladies, and, so far as the mind is concerned, to the greatest vices; and, on the contrary, there is no people who possess bodies more adapted for living long, and minds more awake to the greatest virtues. The nations of the climates intervening between the north and south being more rational and less violent, have recourse to reason, to judges, and to the tribunals. The people of the south appear created for the investigation of the most abstruse sciences, in order to instruct other people; those of the north for labour and mechanical arts; those of the temperate zone for commerce, trafficking, judging, commanding, establishing republics, composing laws for other peoples. With respect to those inhabiting maritime places and large mercantile cities, they are more wily, cunning, and complaisant, than such as are removed from the sea and commerce. Men are more grave and settled where the air is mild and sweet, than they are where it is tempestuous. How far discipline, laws, customs, have the power of changing nature, is well illustrated in the case of Germany. Self-love being one of the strongest motives of man, and emulation one of the most powerful means of the progress of society, the question of rewards occupies a principal place in the state. In the popular state the rewards are more honourable than profitable, for the mob look only to their own advantage; the contrary occurs in a monarchy, in which the prince who distributes the rewards is more jealous

of his honour than profit. The well-being of the state depends on the way in which the rewards and punishments are distributed. To confer ranks of honour appears to him one of the most precious attributes of sovereignty.

Bodin argues for the separation of the judicial and political powers. He maintains that justice ought never be subject to the vices of princes, and to the fancies of the people. He affirms that the more sovereignty augments its prerogatives, the more it diminishes its power. The state cannot fail to prosper when the sovereign retains the prerogatives which concern his sovereignty; the senate guards its authority, the magistrates exercise their power, and justice preserves its ordinary course.

Chapter XVII. is on Internal Security and Alliances. Bodin holds that in the popular state it is expedient to train up to war the subjects, in order to avoid the inconveniences to which such a state is naturally subject. With respect to monarchies, if they are of great extent, it is not expedient that the prince should erect citadels nor strong places except on the frontiers, that the people may not presume that there is an intention to overawe them.

Chapter XVIII. is on Taxes and Finance. The first rule which Bodin lays down in matters of finance is probity. Three points engage alternately our attention. 1. To provide resources for the state. 2. To use them to the profit and honour of the state. 3. To spare and keep some part for any want. He says that in general there are seven methods of supplying the resources of the state. 1. The demesne of the state. 2. Conquest. 3. Gift of friends. 4. Trade. 5. The tribute of allies. 6. Levies from merchants. 7. The taxes of the subjects. The taxes should fall equally upon all.

Bodin published also, in 1591, a work entitled Juris Universi Distributio. In it Jurisprudence is thus described and divided: Ars tribuendi suum cuique, ad tuendam hominum societatem; hæc ad quatuor causas, ac totidem quæstiones, referri potest. An sit, quid sit,

qualis sit, cur sit? Eadem quatuor partibus constat, lege, æquitate, legis actione, judicis officio." Further according to Bodin, law is twofold, natural and human; natural law is inculcated by our reason; human law is the work of man, and is divided into jus gentium and jus civile. However, Bodin adopted the faulty classification of the Roman law: "Materia, circa quam omnis de jure quæstio versatur, in personis est aut in rebus aut in factis et dictis personarum."

9. Although no great writers on Jurisprudence had hitherto appeared in England, the principles of civil and political liberty had been well understood from an early age. Nor did the progress of these principles appear much endangered until the accession of the Tudor line of Sovereigns. The Great Charter of the liberties of England through some of its chapters asserts the natural freedom of man in language to which the experience of six centuries and of far more advanced civilization can add but little. The twenty-ninth chapter of Magna Charta says :—"Nullus Liber Homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus nisi per legale judicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus aut differemus justitiam, vel rectum." So the thirteenth Chapter of Magna Charta provided that all merchants should have their safe and sure conduct to depart out of England, to come into England, to tarry in and go through England, to buy and sell without any manner of civil tolls, by the old and rightful customs, except in time of war. So Bracton, in his treatise "De Legibus Angliæ," boldly laid down that the king could do only what the law allows. His power is to do justice and not injustice. While he does justice, he is the minister of the Eternal King; but when he falls into injustice, he is the minister of the devil: for he is called king, *rex*, from well-governing, not from reigning,—"a bene regendo, et non a

regnando." For he is king when he governs rightly,—a tyrant when he oppresses the people intrusted to him.[1]

John Poynet, Bishop of Winchester, under Edward VI., wrote "A short treatise of Political Power, and of the true obedience which Subjectes owe to Kynges." It was published in 1556. Strype says[2]:—"This book was not favourable to princes. Their rigour and persecutions puts their subjects upon examining the extent of the royal power, which some were willing to curtail and straiten as much as they could. The book was printed again in 1642 to serve the turn of those times." Poynet's work is divided into seven chapters, entitled thus:—I. Whereof politique power groweth, whereof it was ordained, and the right use and duty of the same. II. Whether kings, princes, and other governors, have an absolute power and authority over their subjects. III. Whether kings, princes, and all other politique governors be subject to God's laws, or the positive laws of the country. IV. In what things and how far subjects are bound to obey their princes and governors. V. Whether all the subject's goods be the emperor's or king's own, and that they may lawfully take them for their own. VI. Whether it be lawful to depose an evil governor, and kill a tyrant. VII. What confidence is to be given to princes and potentates. On the doctrine of deposing kings, Poynet says:—"The manifold and continual examples that have been from time to time of the deposing of kings and killing of tyrants do most certainly conform to be most true, just, and consonant to God's judgment. The history of Kings in the Old Testament is full of it. . . . . The reasons, arguments, and laws that serve for the deposing and displacing of an evil governor will do as much for the proof that it is lawful to kill a tyrant, if they may be indifferently heard. As God hath ordained magistrates to hear and to determine private men's matters and to punish their vices, so also he willeth that the magistrate's doing be

[1] De Legibus et Consuetudinibus Angliæ, c. 9.
[2] Strype's Annals, vol. iii. pt. i. p. 535. Oxford ed., 1824.

called to account and reckoning, and their vices corrected and punished by the body of the whole congregation or commonwealth."

The reigns of the Tudors were so unfavourable to popular liberty, and the high ideas of prerogative were so boldly advanced by the ministers of power, that it is remarkable to find the assertion of the true principles of civil government in a work displaying so much eloquence and erudition as the Ecclesiastical Polity. Richard Hooker[1] published the first four books of his Ecclesiastical Polity in 1594; the fifth in 1597. He died in 1600; and the remaining three books were not published until 1647. His works are remarkable for the bold exposition of constitutional principles under the then despotic government of the Tudors. Hooker laid down fundamental ideas of the greatest importance,—the mutability of Positive Law and the eternal obligation of the Divine Law. The assertion of this doctrine in the reign of Elizabeth was a matter of greater consequence than it is in the reign of Victoria. The recent geographical discoveries had introduced a novel feature into the domain of politics. Then for the first time in modern history the learned were beginning to compare the laws and customs of different nations; and the exaggerated accounts of travellers concerning barbarous tribes, naturally caused doubts as to the existence of natural principles of right.

The first book of the Ecclesiastical Polity is on the nature of laws in general. All things that are, have some operation not violent or casual; nor does any thing ever begin to exercise the same without some foreconceived end for which it works. But no certain end could ever be attained unless the actions whereby it is attained were regular; that is to say, made suitable, fit, and correspondent to their end by some canon, rule, or law. All things, therefore, do work after a sort according to law.[2]

[1] B. 1553, d. 1600: Fellow of Oxford. Works of Mr. Richard Hooker, 3 vols. 8vo., Oxford, 1793; ib., Keble's ed., Oxford, 1841.

[2] Eccles. Pol., b. i. s. 2.

By law eternal the learned for the most part do understand the order, not which God hath eternally proposed to himself in all his works to observe, but rather that which with himself he hath set down as expedient to be kept by all his creatures, according to the several conditions with which he hath endowed them. They who thus are accustomed to speak, apply the name of Law unto that only rule of working which superior authority imposeth; whereas we, somewhat more enlarging the sense thereof, term any kind of rule or canon whereby actions are framed, a law.[1] And as natural agents considered in themselves have their law, which law directs them in the means whereby they tend to their own perfection, so likewise another law there is which teacheth them, as they are sociable parts united into one body—a law which binds them each to serve unto other's good, and all to prefer the good of the whole before whatsoever their own particular.[2]

The laws of action are made to guide man's will. The will, properly and strictly taken, differs greatly from that inferior natural desire which we call appetite. The object of appetite is whatever sensible good may be wished for; the object of will is that good which reason doth lead us to seek. Affections, as joy and grief, and fear and anger, being as it were the sundry fashions and forms of appetite, cannot choose but rise at the sight of some things. Wherefore, it is not altogether in our power whether we will be stirred with affections or no. Whereas, actions which issue from the disposition of the will, are in the power thereof to be performed or stayed. Let reason teach impossibility in any thing, and the will of man doth let it go. A thing impossible it doth not affect, the impossibility thereof being manifest. There is in the will of man naturally that freedom whereby it is apt to take or refuse any particular object whatsoever being presented to it. Whereupon it follows, that there is no particular object so good, but it may have the show of some difficulty or unpleasant quality annexed to it in

[1] B. i. s. 3. [2] Ib.

respect whereof the will may shrink and decline; if contrariwise, for so things are blended, there is no particular evil which hath not some appearance of goodness whereby to insinuate itself. For evil as evil cannot be desired.[1]

The most certain token of evident goodness is, if the general persuasion of all men do so account it. And, therefore, a common received error is never utterly overthrown till such times as we go from signs unto causes, and show some manifest root or fountain thereof common unto all, whereby it may clearly appear how it hath come to pass that so many have been overseen. Wherefore, although we know not the cause, yet thus much we may know, that some necessary cause there is, whensoever the judgments of all men generally, or for the most part, run one and the same way, especially in matters of natural discourse; for of things necessarily and naturally done, there is no more affirmed than this,—they keep either always or for the most part one tenure, Ἡ ἀεὶ ἢ ὡς ἐπὶ τὸ πολὺ ὡσαύτως ἀποβαίνει.[2] The general and perpetual voice of man is as the sentence of God himself. For that which all men have at all times learned, nature herself must needs have taught. Infinite duties there are, the goodness whereof is by this rule sufficiently manifested, although we had no other warrant besides to approve them. A law, therefore, generally taken is a directive rule unto goodness of operation.[3]

In goodness there is a latitude or extent whereby it comes to pass that even of good actions some are better than other some; whereas otherwise one man could not excel another, but all should be either absolutely good or be excluded out of the number of well-doers. Degrees of well-doing there could be none, except, perhaps, in the seldomness or oftenness of doing well. But the nature of goodness being thus ample, a law is properly that which reason in such sort defineth to be good that it must be done. And the law of reason or human nature is that which men by discourse of natural reason,

1 B. i. s. 7., οὐδεὶς ἑκὼν κακός the maxim of Socrates.
2 Arist. Rhet., b. i. c. 39. 3 Eccles. Pol., b. i. s. p. 225.

have rightly found out themselves to be all for ever bound unto in their own actions. Laws of reason have these marks to be known by; such as keep them resemble most lively in their voluntary actions that very manner of working which nature herself doth necessarily observe in the course of the whole world. The works of nature are all behoveful, beautiful, without superfluity or defect; even so theirs, if they be found according to that which even the law of reason teacheth. Secondly, those laws are investigable by reason without the help of revelation, supernatural and divine. Finally, in such sort they are investigable, that the knowledge of them is general. The world hath always been acquainted with them, as Sophocles observes concerning a branch of this law; it is not of to-day or yesterday, but hath been no man knows how long since,—

οὐ γάρ τι νῦν γε κἀχθὲς ἀλλ' ἀεί ποτε
ζῇ ταῦτα, κοὐδεὶς οἶδεν ἐξ ὅτου 'φάνη.[1]

It is not agreed upon by one, or two, or few, but by all; which we may not so understand, as if every particular man in the whole world did know and confess whatsoever the law of reason doth contain; but this law is such that being proposed, no man can reject it as unreasonable and unjust. Again, there is nothing in it but any man having natural perfection of wit and ripeness of judgment may find out. Law rational, therefore, which men commonly use to call the law of nature, meaning thereby the law which human nature knoweth itself in reason universally bound unto, which also, for that cause, may be termed most fitly the law of reason,— this law comprehends all those things which men, by the light of their natural understanding, evidently know, or at least may know, to be good or evil for them to do.[2]

Now the due observation of this law, which reason teaches us, cannot but be effectual unto their great good that observe the same. For we see the whole world and each part thereof so compacted that as long as each thing performeth only that work which is natural to it, it

[1] Sophocles, Antigone. [2] Eccles. Pol., b. i. s. 8. p. 232.

thereby preserves both other things, and also itself. Contrariwise, let any principal thing, as the sun, the moon, any one of the heavens or elements, but once cease, or fail, or swerve, and who doth not easily conceive that the sequel thereof would be ruin both to itself and whatsoever dependeth on it? And, is it possible, that man being not only the noblest creature in the world, but even a very world in himself, his transgressing the law of his nature should draw no manner of harm after it?—Yea, tribulation and anguish unto every soul that doth evil.[1]

It remains, then, to consider how nature finds out such laws of government as serve to direct even nature depraved to a right end. All men desire to lead in this world a happy life; that life is led most happily wherein all virtue is exercised without impediment or let. But in the world there has been always much wickedness—much misery. To take away all such mutual grievances, injuries, and wrongs, there was no way but only by growing unto composition and agreement among themselves by ordaining some kind of government public, and by yielding themselves subject thereto; that unto whom they granted authority to rule or govern, by them the peace, tranquillity, and happy estate of the rest might be procured. Men always knew that when force and injury was offered, that they might be defenders of themselves. They knew that however men may seek their own commodity, yet if this were done with injury unto others it was not to be suffered, but by all men, and by all good means, to be withstood. Finally, they knew that no man might in reason take upon him to determine his own right, and according to his own determination proceed in maintenance thereof; inasmuch as every man is towards himself and them whom he greatly affecteth, partial; and therefore that stripes and troubles would be endless, except they gave their common consent all to be ordered by some whom they should agree upon. Without which consent there were no reason that one man should take

[1] B. i. s. 9. p. 236.

upon him to be lord or judge over another; because, although, according to the opinion of some very great and judicious men, there is a kind of natural right in the noble, wise, and virtuous, to govern them which are of servile disposition; nevertheless, for manifestation of this their right, and men's more peaceable contentment on both sides, the assent of them who are to be governed seems necessary.[1]

At the first, when some certain kind of regiment was once approved, it may be that nothing was then further thought upon for the manner of governing, but all permitted unto their wisdom and discretion which were to rule; till by experience they found this for all parts very inconvenient, so as the thing which they had devised for a remedy did indeed but increase the sore which it should have cured. They saw that to live by one man's will became the cause of all men's misery. This constrained them to come unto laws wherein all men might see their duties beforehand, and know the penalties of transgressing them. If things be simply good or evil, and withal universally so acknowledged, there needs no new law to be made for such things. The first kind, therefore, of things appointed by laws human containeth whatsoever being in itself naturally good or evil, is notwithstanding more secret than that it can be discerned by every man's present conceit, without some deeper discourse and judgment.[2]

Besides that law which simply concerns men as men, and that which belongs unto them as they are men linked with others in some form of politic society, there is a third kind of law which teacheth all such several bodies politic, so far forth as one of them hath public commerce with another. And this third is the law of nations; between men and beasts there is no possibility of sociable communion, because the well-spring of that communion is a natural delight which men hath to transpose from himself into others and to receive from others into himself; especially those things wherein the excellency of his kind

[1] B. i. s. 10. p. 242. [2] P. 244.

doth most consist. Civil society doth more content the nature of man than any private kind of solitary living; because, in society this good of mutual participation is so much larger than otherwise. Herewith, notwithstanding we are not satisfied, but we covet to have a kind of society and fellowship even with all mankind, which thing Socrates intending to signify proposed himself a citizen not of this or that commonwealth, but of the world.[1] And an effect of that very natural desire in us appears by the wonderful delight men have, some to visit foreign countries, some to discover nations not heard of in former ages, all to know the affairs and dealings of other people, and to be in league of amity with them.[2]

Hooker has boldly laid down as an axiom of nature that natural desire cannot be utterly frustrate.[3] In this sense it may fairly be contended that those which we term evil desires, in some indirect way tend to ultimate good; even as the existence of misery upon the earth is a spur to industry.

In the last section of the first book in the Ecclesiastical Polity it is explained why this digression on the nature of laws in general is prefixed. The drift and purpose of all this is even to show in what manner as every good and perfect gift, so this very gift of good and perfect laws, is derived from the Father of Lights, to teach men a reason why just and reasonable laws are of so great force, of so great use in the world; and to inform their minds with some method of reducing the laws, whereof there is present controversy, unto their first original causes, that so it may be in every particular ordinance, thereby the better discerning, whether the same be reasonable, just, and righteous, or not. For nothing can be thoroughly understood or soundly judged of till the very first cause and principles from which originally it springeth be made manifest.

Of law there can be no less acknowledged, than that her seal is the bosom of God, her voice the harmony of

[1] Cic. Tusc., v. and i. De Legibus. [2] Eccles. Pol., b. i. s. 10. vol. i. p. 253.
[3] Ib. b. i. s. 11.

the world; all things in heaven and earth do her homage, the very least is feeling her care, and the greatest is not exempted from her power; both angels, and men, and creatures, of what condition soever, though each in different sort and manner, yet with all uniform consent, admiring her as the mother of their peace and joy.

Mr. Hallam has pointed out that this celebrated sentence of law, concluding the first book of Hooker's Ecclesiastical Polity is in substance the same with the definition of Eternal Law by Suarez.—"Legem æternam esse decretum liberum voluntatis Dei statuentis ordinem servandum, aut generaliter ab omnibus partibus universi in ordine ad commune bonum, vel immediatè illi conveniens ratione totius universi, vel saltem ratione singularum specierum ejus, aut specialiter servandum a creaturis intellectualibus quoad liberas operationes earum." Hooker advanced those principles of government which were afterwards illustrated by Locke. He derives the origin of government from a primary contract, "without which consent there were no reason that one should take upon him to be lord or judge over another; because although there be, according to the opinion of some very great and judicious men, a kind of natural right in the noble, wise, and virtuous, to govern them which are of servile disposition, nevertheless for manifestation of this their right, and men's more peaceable contentment on both sides, the assent of them who are to be governed seemeth necessary." And again he lays down that of this no man doubts, namely, that in all societies, companies, and corporations, what severally each man shall be bound unto, it must be with all their assents ratified. Against all equity it were that a man should suffer detriment at the hands of men, for not observing that which he never did, either by himself or others, mediately or immediately agree unto.

It has been maintained that the eighth book of the Ecclesiastical Polity, in which these liberal ideas on political society are promulgated chiefly, was interpolated

or altered by the Puritans after his death. Mr. Hallam,[1] however, considers there is no foundation for this opinion. The testimony that has been brought forward to throw a doubt over the authenticity of the three last books consists in those vague and self-contradictory stories which gossiping compilers of literary anecdote can easily accumulate, whilst the intrinsic evidence arising from the work itself seems altogether to repel every suspicion.

We now conclude the review of the jurists of the sixteenth century. The sixteenth century was remarkable for the variety and boldness of its speculations in moral and political philosophy. The adverse religious parties agitated all the problems of the state. The principle of the sovereignty of the people was supported by history, reason, the authority of the Scriptures, and was boldly pursued into its furthest consequences. The idea of monarchy was limited by the idea of liberty of conscience. The Utopists questioned the essential principles of society, and asserted—some in ingenious and chimerical books, some with arms in their hands—unknown forms of social government. The doctrine of tyrannicide was advocated by the most advanced writers. Their works in the succeeding century were used as justificatory pieces by the executioners of Charles I. All the questions which still agitate modern times were discussed in this century. The rights and duties of property were enounced. Slavery received its final condemnation in Europe. The ideas of political and religious liberty were originated.

[1] Constitutional History of England, vol. i. p. 215. (4th ed.)

END OF BOOK III.

BOOK IV.

HISTORY OF JURISPRUDENCE IN THE SEVENTEENTH CENTURY.

"La terza è la Giurisprudenza umana, che guarda la verità d' essi fatti, e piega benignamente la ragion delle leggi a tutto ciò che richiede l' ugualità delle cause: la qual Giurisprudenza si celebra nelle repubbliche libere popolari, e molto più sotto le monarchie, ch' entrambe sono governi umani. Talchè le Giurisprudenze divina et eroica si attennero al certo ne' tempi delle nazioni rozze; l' umana guarda il vero ne' tempi delle medesime illuminate: e tutto ciò in conseguenza delle diffinizioni del Certo e del Vero, e delle degnità che se ne sono poste negli Elementi."

Vico: Scienza Nuova, lib. iv. opere, vol. v. 508.

"The third species of Jurisprudence was human Jurisprudence, which considers the truth of facts and modifies legal right according to the principle of equality. It is in use in free, popular republics, and more still in monarchies, for both are human governments. The divine and heroic Jurisprudence endeavour to attain certainty in the periods of barbarism. Human Jurisprudence considers the truth in the period of civilization."

Vico: The New Science, book 4, works, vol. v. 508.

"Res olim dissociabiles Principatum et Libertatem miscuerunt."

"They united Royalty and Liberty,—things once incapable of being joined together."

Tacitus: Agricola.

"Reason is the soul of all law. The common law of the land is founded on reason; equity is reason perfected, unwritten, but perfecting written law. Statute or written laws are deductions drawn from common law, which is founded on right reason, culled and drawn from the experience of ages, and admitted as such by the consent of wise men."

Maltravers.

BOOK IV.

HISTORY OF JURISPRUDENCE IN THE SEVENTEENTH CENTURY.

CHAPTER I.

1. Lord Bacon, 1561–1626.

Authorities: Mallet's Life of Bacon; Rawley's Life of Bacon; R. Stephen, Letters and Remains of Lord Chancellor Bacon, London, 1734, 4to.; Lord Campbell's Lives of the Lord Chancellors of England; Lewes' Biographical History of Philosophy, London, 1846 and 1857.

Works: De Dignitate et Augmentis Scientiarum: London, 1623. Complete works: Amsterd., 1662, 6 vols. 12mo; London, 1740, fol. 4 vols., by Mallet; London, 1825–34, 17 vols. 8vo., edited by Basil Montagu.

We have now briefly to discuss the few and fragmentary works on Jurisprudence left by one of the noblest intellects of the world,—the philosopher in whom England should take the greatest pride, even though the weakness of his character has somewhat tarnished the glory of his talents. Francis Bacon, Lord Verulam, is immortalized in modern philosophy as the discoverer of the inductive method. All previous systems had used the syllogistic proof by argument. There are two ways, says Lord Bacon, of searching after and discovering truth; the one from sense and particulars rises directly to the most general axioms, and resting upon those principles and their unshaken truth, finds out intermediate axioms, and this is the method in use; but the other raises axioms from sense and particulars by a continual and gradual ascent, till at last it arrives at the most general axioms, which is the true way, but hitherto untried. The understanding, when left to itself, takes the first of these ways; for the mind delights in springing up to the most general axioms, that it may find rest; but after a short stay there it disdains experience, and these mischiefs are at length increased by logic for the ostentation of disputes.

Mr. Lewes has clearly shown the great step in philosophy which Bacon made when he proclaimed that physics was the mother of all the sciences—an idea so far in advance of his age that even now the notion of morals and politics having the same method, and being susceptible of the same treatment as physics, is looked upon as fanciful if not absurd. A second cause of error in preceding philosophers, says Lord Bacon, is that through all those ages wherein men of genius and learning principally or even moderately flourished, the smallest part of human industry has been spent upon natural philosophy, though this ought to be esteemed as the great mother of the sciences, for all the rest, if torn from this root, may perhaps be polished and formed for use, but can receive little increase. But let none expect any great promotion of the sciences, especially in their effective part, unless natural philosophy be drawn out to particular sciences; and, again, unless these particular sciences be brought back again to natural philosophy. From this defect it is that astronomy, optics, music, many mechanic arts, and what seems strange, even moral and civil philosophy and logic, rise but little above their foundations, and only skim over the varieties and surfaces of things, viz. because after these particular sciences are formed and divided off they are no longer nourished by natural philosophy, which might give them strength and increase; and therefore no wonder if the sciences thrive not when separated from their roots.[1]

Lord Bacon unquestionably was the first in modern times who conceived a true idea of the science of Jurisprudence. But immersed in public duties and in other branches of human learning, he had no leisure to compose a complete work on the subject of law. Nor did he compose any work on government or international rights and duties,—those lofty themes which, since the revival of learning, had employed the pens of Suarez and Bodinus, and were soon to be illustrated by Grotius.

[1] Nov. Org. i. Aph. 79, 80. [2] De. Aug. Scien., lib. viii. c. ii. s. 2.

The juridical tracts which he has left, namely, the Proposal to King James of a Digest to be made of the Laws of England, and the Proposal for amending the Laws of England, and the Tractatus De Fontibus Juris[2], are mainly concerned about the laws of procedure;—or those laws which Bentham terms adjective, in contradistinction to the substantive laws, whose execution they accomplish. In these certainly Bacon lays down the principles of codification, which, long neglected by the technical lawyers of England, at length were cultivated with minutest accuracy by Bentham, and in the present century began to be applied to our criminal law by Sir Robert Peel.

The unfinished tract termed the New Atlantis was plainly suggested by the Utopia of Sir Thomas More. In it is exhibited the model of a college instituted for the interpreting of nature and the producing of great and marvellous works for the benefit of men. It also was Bacon's design to have composed in it a frame of laws the best suited for a well ordered polity. And the scheme of the whole work was to show the unbounded progress and improvement open to mankind. Dean Swift's voyage to Laputa ineptly satirizes a great portion of the Atlantis.

The conclusion of the eighth book, De Augmentis Scientiarum, is well known to contain a masterly exposition of the principles of judicature. Lord Bacon devoted only a small portion of this work to the science of law either public or private. The portion applicable to the former is the short Tractatus De Proferendis Finibus Imperii: the portion applicable to the latter is the Tractatus de Fontibus Juris. Nowhere do we find more profound and philosophic views concerning the origin, the objects, the qualities, the progress, the revise, the digested compilation of human laws. It is very much to be regretted that this portion of the work was never completed, and that we now have only one title, on the Certainty of Law.

I have not attempted to compress the pregnant brevity of the aphorisms in which Lord Bacon has communicated his ideas. On the contrary, I have almost literally

translated the entire of the Tractatus de Fontibus Juris, believing that an attentive study of the whole will be most useful to the jurist, the legislator, and the practical lawyer.[1]

The introduction to this title is general, and the former method of discussing the subject is censured. All who have written of laws have treated that argument either as philosophers or lawyers. And the philosophers propose many things beautiful in language, yet remote from use. But the lawyers bound and devoted each to the pleadings of the laws of his own country, or even to those of the Roman or Pontifical laws, do not employ an impartial judgment, but discourse as it were out of fetters. Certainly, this knowledge properly regards statesmen, who best discern what human society can bear,—what the welfare of the people,—what natural equity,—what the customs of nations,—what the diverse forms of states. Wherefore, let this be our business, to seek the fountains of justice and public utility, and exhibit in the several parts of law a certain character and idea of the just, whereby students of this science may be able to prove the laws of particular kingdoms and states, and hence contrive an emendation.[2] Lord Bacon accordingly gives an example of this subject in one title, and terms it an example of a treatise on universal justice, or on the origins of right in one title, by aphorisms.

In reference to the phrase De Fontibus Juris, it may be observed the word *Law* in the English language has been used to denote two separate and distinct ideas, which

[1] The essay "De Augmentis" has already been imperfectly translated by Wats, Cary, and Shaw. A corrected edition of Shaw's translation has been published by Bohn (London, 1853).

[2] "I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to be infected; but much more is this performed if a man be able to visit and strengthen the roots and foundation of the science itself; thereby not only gracing it in reputation and dignity, but also amplifying it in perfection and substance."—*Lord Bacon's Preface to Maxims of the Common Law.*

in Greek, Latin, and the modern languages of Europe, have been expressed by separate words. Thus, in Greek, we find τὸ δικάιον and νὸμος;—in Latin, Jus and Lex;—in Italian, Diritto and Legge;—in French, Droit and Loi;—in Spanish, Derecho and Ley;—in German, Recht and Gesetz. By the first class of these terms is usually designated abstract justice, the collection of rules which individuals ought to observe towards one another, and which are susceptible of enforcement by the state. By the second class is usually designated the collection of positive rules for the conduct of individuals to each other, which have been established in a country, and have been ascertained and recognised by the judicial establishments of the nation. But even in English the signification of the first set of terms is expressed by the abstract general substantive "right." In the following translation, *jus* is sometimes translated by *right*, sometimes by *law*.

In civil society, either law or violence prevails. But there is, too, some violence which pretends law, and some law that savours rather of violence than of the equity of right. The origin of injustice is, therefore, threefold: —pure violence, cunning entanglement under pretext of law, and the rigour of the law itself.[1]

The foundation of private law is this: He who does an injury, from the fact receives advantage or pleasure —from the example, danger. Others are not partners in the advantage or pleasure, but believe the example pertains to themselves. Wherefore, they readily combine in consent to take precautions for themselves by means of laws; that the injury may not in turn come to each individual. But if by reason of the times and the community of guilt, this may happen, that for the majority, and the more powerful, danger is created rather than prevented by any law, faction annuls the law, which also often happens.[2] This theory in reference to the origin of private law is certainly correct only in reference to the enactment of adjective laws, and is not correct in reference to the original growth of law amongst a

[1] Aph. i. [2] Aph. ii.

people. Rochefoucauld has expressed Bacon's idea when he said, L'Amour de la Justice n'est en la plus part des hommes que la crainte de souffrir l'injustice.

But private law lies under the protection of public law. For the law provides for the citizens; the magistrates for the laws. The authority, however, of the magistrates depends on the majesty of empire, and the form of polity, and the fundamental laws. Therefore, if on this side there be soundness and a right constitution, laws will be of good use; if not, there will be little protection in them.[1]

Nor yet does public law regard this only, that a guardian, as it were, should be given to private law, in order that this may not be violated, and that injuries may cease; but it is extended also to religion, and arms, and discipline, and wealth; finally, to all things concerning the prosperity of the state.[2]

For the end and scope which laws ought to regard, and to which they should direct their commands and sanctions, is nothing else than that citizens may live happily. This will ensue if they be rightly instructed in piety and religion, honest in their manners, protected by arms against foreign enemies, defended by the assistance of the laws against seditions and private injuries, obedient to authority and the magistrates, rich and flourishing in abundance and wealth. But of these things laws are the instruments and sinews.[3]

And this end the best laws attain; but most of them miss it. For laws mutually differ in a wonderful manner, and by the greatest interval; so that some excel; others are middling; others altogether bad. Wherefore Lord Bacon proposes to suggest, as it were, certain laws of laws, from which information may be derived what in individual laws may be well or ill established or constituted.[4]—Leges Legum, ex quibus informatio peti possit, quid in singulis legibus bene aut perperam positum aut constitutum sit. From the preface to Lord Bacon's tract entitled "Elements of the Common Law of England,"

[1] Aph. iii. [2] Aph. iv. [3] Aph. v. [4] Aph. vi.

written whilst he was Solicitor-General to Elizabeth, we learn that the phrase "leges legum" had been previously used by some "great civilian." Bacon does not inform us who this great civilian was; nor is the research of modern writers likely to discover him. In this tract on the Common Law of England, the phrase leges legum is not used in the same sense as in the De Augmentis; nor, says Dugald Stewart, does Bacon in that tract "seem yet to have risen to the vantage ground of Universal Jurisprudence." His great object, Bacon tells us, was "to collect the rules and grounds dispersed throughout the body of the same laws, in order to see more profoundly into the reason of such judgments and ruled cases, and thereby to make more use of them for the decision of other cases more doubtful; so that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation of this time, will by this new strength laid to the foundation be somewhat the more settled and corrected." Thus Bacon at first applied the phrase to the leading principles of a body of municipal law, and afterwards to the principles of Universal Justice. But before he descends to the very body of particular laws, he touches on the virtues and dignities of laws in general. A law may be deemed good which is certain in intimation, just in precept, convenient in the execution, agreeing with the form of polity, and generating virtue in subjects.[1]

The first dignity of laws is that they be certain. It is of so much importance to a law, that it be certain, that without this neither can it be just. "For if the trumpet give an uncertain voice, who shall equip himself for war?"[2] Similarly, if the law give an uncertain voice, who shall prepare himself to obey? Therefore, it is necessary that it warn before it strike. Also this is well laid down; that law is the best which leaves least to the discretion of the judge, which its certainty effects.—Optima lex quæ minimum relinquit arbitrio judicis.[3]

[1] Aph. vii. [2] St. Paul, 1 Cor. xiv. 8. [3] Aph. viii.

The uncertainty of laws is twofold; one, where no law is prescribed; another, where it is doubtful and uncertain.[1] Lord Bacon in the Proposal for Amending the Laws of England has thus characterized the uncertainty that then prevailed: "But certain it is that our laws, as they now stand, are subject to great uncertainties and variety of opinions, delays, and evasions; whereof ensueth:—1. That the multiplicity and length of suits is great. 2. That the contentious person is armed, and the honest subject wearied and oppressed. 3. That the judge is more absolute; also in doubtful cases hath a greater stroke and liberty. 4. That the Chancery courts are not filled, the remedy of law being often obscure and doubtful. 5. That the ignorant lawyer shroudeth his ignorance of law, in that doubts are so frequent and many. 6. That men's assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow, and many the like inconveniences."

Cases omitted by the law are now first discussed. The narrowness of human wisdom cannot include all the cases which time discovers. Therefore, omitted and new cases not unfrequently display themselves. In cases of this kind a threefold remedy or supplement is employed; either by a proceeding according to similar cases, or by the use of precedents, though they have not grown into law, or by jurisdictions which determine according to the judgment of a good man, and according to sound discretion, whether the courts be Prætorian or Censorial.[2]

In omitted cases the rule of law is to be derived from similar cases, but cautiously, and with judgment. About which the following rules are to be observed. Let Reason be fruitful—Custom barren, nor let it engender cases. Wherefore, whatever is received contrary to the reason of Right, or even where its reason is obscure, is not to be drawn into a consequence.[3]

A remarkable public good draws to itself omitted cases. Therefore, when any law remarkably, and in a greater manner than ordinary, regards and provides for the wel-

[1] Aph. ix. [2] Aph. x. [3] Aph. xi.

fare of the commonwealth, its interpretation should be extensive and ample.[1]

It is harsh to torture laws for this, that they may torture men. Lord Bacon therefore is not of opinion that penal laws, much less capital, should be extended to new offences. Yet if the crime be old and well known to the laws, but its prosecution light upon a new case not foreseen by the laws—we must by all means depart from the formal rules of law, rather than that crimes should remain unpunished.[2]

In statutes which plainly repeal the Common Law (especially with respect to those things which frequently happen, and are of long continuance), Lord Bacon is of opinion that procedure should be made by similitude to omitted cases. For when the state has long wanted a complete body of law, and this in cases expressed, there is little danger, if omitted cases wait for a remedy by a new statute.[3]

The statutes which manifestly were temporary laws, and sprung from the occasions then presiding in the state, the reason of the times being changed, are sufficiently regarded if they can be sustained in their proper cases; but it would be preposterous if they were in any manner applied to omitted cases.[4]

There is no consequence of a consequence; but the extension must be arrested within the proximate cases, otherwise by degrees we will glide into dissimilar; and the subtleties of intellects will avail more than the authorities of the laws.[5]

In laws and statutes of a somewhat compendious style, extension is to be made more freely; but in those which are enumerative of particular cases, more cautiously. For, as exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated.[6]

An explanatory statute dams up the streams of a former statute, nor is the extension afterwards received in either statute. For further extension is not to be

[1] Aph. xii. [2] Aph. xiii. [3] Aph. xiv. [4] Aph. xv. [5] Aph. xvi. [6] Aph. xvii.

made by a judge when once the extension has begun to be made by a law.[1]

The formula of words and of acts of court does not admit of an extension unto like cases. For what departs from custom to discretion loses the nature of formality; and the introduction of new things corrupts the majesty of the old.[2]

The extension of the law is easy to cases of after-origin, which were not in the nature of things at the time of the law being enacted. For where the case could not be expressed, because then there was none such, the omitted case is held as an expressed case if the reason be the same.[3]

Next are discussed precedents and their use. Right is to be inferred from precedents, where the law is deficient. There is a distinction between custom, which is a kind of law, and precedents, which, by frequent practice, have passed into custom as though a tacit law. But now those precedents are discussed which rarely or seldom happen, and have not grown into the force of a law; when and with what caution the rule of right is to be derived from them when the law is deficient.[4]

Precedents are to be derived from good and moderate times, not from tyrannical, or factious, or dissolute. Precedents of such a time are of spurious origin, and rather hurt than help.[5]

In precedents, the more modern are to be considered as the more safe. For why should not that be again repeated which has been lately done, and from which no inconvenience has followed? But nevertheless modern examples have less authority; and if perchance it be necessary that things should be ameliorated, recent examples rather taste of their own age than of right reason.[6]

But more ancient examples must be received cautiously and with selection; inasmuch as the course of time changes many things, so that what might seem ancient by reason of time may, through perturbation and inconformity to the present age, be plainly novel. There-

[1] Aph. xviii. [2] Aph. xix. [3] Aph. xx. [4] Aph. xxi. [5] Aph. xxii. [6] Aph. xxiii.

fore, the examples of a middle time are the best, or even of such a time as may best agree with the current time; which sometimes the more remote time affords rather than the nearest.[1]

We should keep ourselves within, or rather on the near side of the limits of precedents, and not in any way pass beyond them. For where there is no rule of law, all things are to be considered as suspected; wherefore, as in obscure cases, that is to be followed which is least obscure.[2]

Fragments and compendiums of precedents are to be guarded against; and the precedent must be entirely regarded, and its whole process. For if it be unbecoming without having surveyed the entire law to give judgment on a part of it, this rule ought to prevail far more in the case of precedents; which are of doubtful use unless they completely square.[3]

In precedents it is of great importance through what hands they have passed and been transacted, for if they have obtained with only the scriveners and clerks of justice, according to the course of court, without manifest knowledge of their superiors; or with the people—the master of errors, they are to be rejected and treated as nought. But if they have been so placed beneath the eyes of the senators, judges, or principal courts, that they must have been at least strengthened with the tacit approbation of the judges, they have more authority.[4]

More authority is to be attributed to precedents which have been published, however little they have been in use; since notwithstanding they have been agitated and winnowed by men's discourses and discussions; but less to those which have remained in closets and archives as it were buried, and plainly have gone into oblivion. For precedents, like waters, are most wholesome in the running stream.[5]

Precedents that regard laws should not be drawn from historians, but from public acts and more diligent traditions. For a certain infelicity is frequent even amongst

[1] Aph. xxiv. [2] Aph. xxv. [3] Aph. xxvi. [4] Aph. xxvii. [5] Aph. xxviii.

the best historians, that they do not sufficiently dwell on Laws and Judicial Acts; or if perhaps they use some diligence, still they vary much from the authentic sources.[1]

A precedent which a contemporary age or the nearest has rejected, when the case shall suddenly recur, is not to be easily admitted. For neither does it make so much for it, that men have occasionally employed it, as against it, that being used, they have abandoned it.[2]

There should be courts and jurisdictions, to decide according to the discretion and sound judgment of a good man, where a rule of law is wanting. For the law, as has been said before, does not suffice for all cases; but is fitted for those which most frequently happen. But "time is wisest," as has been said by the ancients, and the daily author and inventor of new cases.[3]

One branch of the equitable jurisdiction of the Court of Chancery in England has arisen from the natural development of the principle alluded to by Lord Bacon in this last aphorism. In consequence of the Courts of Common Law being limited in jurisdiction to certain forms of action, and certain judgments consequent upon such forms, they were unable to give the relief required in the more complicated cases of modern society. And suitors were obliged to have recourse to Chancery as a sort of supplement to the Common Law Courts. This portion of the jurisdiction exercised by Courts of Equity is now of much greater importance than that which is popularly assigned as their sole duty,—the relief against the rigour of the strict Common Law.

But new cases happen both in criminal matters, which require punishment, and civil matters, which require relief. Lord Bacon terms the courts which regard the former censorial, those which regard the latter, prætorian.[4]

The censorial courts should have jurisdiction and power not only of punishing new offences, but also of increasing the punishments established by the laws for

[1] Aph. xxix. [2] Aph. xxx. [3] Aph. xxxii. [4] Aph. xxxiii.

old offences, if the cases be odious and enormous, provided they be not capital. For enormity is, as it were, novel.[1] Lord Bacon here suggests that the principle which has established a Court of Equity in civil cases in England should also be extended to criminal matters. In this department of Jurisprudence, however, we have not emerged from the technical phase. In early times the excessive technicality of the English criminal law may have been favourable to the liberty of the subject; although even this is doubtful.

In like manner Prætorian Courts should have the power as well of relieving against the rigour of the law as of supplying the defect of the law. For if a remedy ought to be extended to that which the law has passed over, much more to him whom it hath wounded.[2]

The Censorial and Prætorian Courts should by all means be restrained within enormous and extraordinary cases, nor invade the ordinary jurisdictions; lest perhaps the matter extend to the supplanting rather than to the supplement of law.[3]

These jurisdictions should reside only in the superior courts, nor be communicated to the inferior. For the power of supplying, extending, or moderating the laws differs little from the power of making them.[4]

These courts should not be intrusted to one man, but should consist of many. Nor should judgments issue forth in silence; but the judges ought to give the reasons of their opinion, and this openly and in the presence of the public: so that what is free in very power may yet in fame and reputation be circumscribed.[5]

There should be no rubrics of blood; nor should any pronounce on capital crimes in any courts, unless from a certain and known law. For God himself first appointed death, afterwards inflicted it. Nor is life to be taken unless from him who knew beforehand that he sinned against his own life.[6]

[1] Aph. xxxiv. [2] Aph. xxxv. [3] Aph. xxxvi. [4] Aph. xxxvii. [5] Aph. xxxviii. [6] Aph. xxxix.

The Censorial Courts should give a third sentence; that the necessity may not be imposed on the Judges of either acquitting or convicting, but that also they may be able to say, "It doth not appear"[1]—"non liquet."[2] The Scotch verdict, "not proven," and the "ignoramus" of a Grand Jury in England and Ireland are analogous. But it is a great fault in the English criminal law that a petit jury is not allowed to find "not proven." Cases frequently occur in which, from insufficient evidence, juries are obliged to acquit the prisoner, although there be no moral doubt of his guilt. In such cases the jury ought to be allowed to find "not proven," the prisoner should be retained in custody, and there should be a new trial, at the option of the Crown prosecutor.

In Censorial Courts the very commencements and all the intervening acts of great crimes and offences should be punished; even though the consummate result may not follow: and this ought to be even the greatest use of those Courts; since it pertains to severity that the beginnings of crimes should be punished, and to clemency that their perpetration should be intercepted by punishing the intervening acts.[3]

It is most of all important to the certainty of laws that the Prætorian Courts do not expand and overflow to such an extent, as under pretext of mitigating the rigour of the laws, to destroy or relax their strength and sinews, in drawing all things to discretion.[4]

There should be no right in Prætorian Courts of deciding against an express statute, under any pretext of equity. For if this were to be done, the Judge would forthwith merge into the legislator, and all things would depend on discretion. Lord Bacon briefly notices the question as to the fusion of law and equity. Biassed by the English practice, he decides in favour of separate jurisdictions. He says that some are of opinion that the

[1] Non liquere dixerunt (judices).—(Cic. Cluent. 28.)
[2] Aph. xl. [3] Aph. xli. [4] Aph. xlii. [5] Aph. xliv.

jurisdiction which decrees according to the equitable and good, and the other, which proceeds according to strict law, should be deputed to the same courts ; but others consider to different courts. The separation of courts is altogether his opinion. For neither would the distinction of cases be observed if there be an intermingling of jurisdictions. But discretion at last would absorb the law.[1] The fallacy of this reasoning is apparent. For it is plain that if in the same country, under the same government, relief will be given in one court of justice against the *jus strictum*,—the rigour of the law, it never ought to be the rule in another. It is plain that all equitable defences ought to be allowed at law. Nor is there any reason why a question on the Statute of Frauds ought to be decided differently in the Queen's Bench and in Chancery.

Lord Bacon commends the Table of the Prætor, in which he prescribed and published in what way he would administer justice. After which example the judges ought to propound certain rules for themselves, as far as possible, and openly publish them. For that is the best law which leaves least to the will of the judge; the best judge who leaves least to himself.—"Etenim optima est lex, quæ minimum relinquit arbitrio Judicis; optimus Judex qui minimum sibi."[2]

There is another kind of supplement of omitted cases, where law supervenes law, and withal draws with it omitted cases. This happens in laws or statutes which retrospect, as it is called; laws of which species are rarely and with great caution to be employed. For a Janus in laws is to be avoided.[3]

He who eludes and circumvents the words or meaning of a law by captiousness and craft deserves himself to be ensnared by a succeeding law. Therefore, in cases of fraud and crafty evasion it is just that laws should retrospect, and be severally aids to one another; that he who studies wiles, and the overthrow of present laws, may at least dread the future.[4]

[1] Aph. xlv. [2] Aph. xlvi. [3] Aph. xlvii. [4] Aph. xlviii.

Laws which strengthen and establish the true intention of acts and instruments against the defects of forms and solemnities must rightly comprehend the past. For the principal inconvenience of a law which retrospects is lest it may disturb.—"Leges quæ actorum et instrumentorum veras intentiones contra formularum aut sollennitatum defectus roborant et confirmant, rectissimè præteritum complectuntur. Legis enim quæ retrospicit vitium vel præcipuum est quod perturbet." But confirmatory laws of this kind regard the peace and stability of transactions. Still care must be taken lest adjudged cases be shaken.[1]

We ought diligently to take care lest those laws only be deemed to regard the past which invalidate previous transactions; but those also which prohibit and restrain future actions necessarily united with the past. As if any law should prohibit some kinds of tradesmen from selling their merchandize for the future; this speaks for the future, but operates on the past. For neither is it absolutely in the power of those persons to get their living in another way.—"Neque enim illis aliâ ratione victum quærere jam integrum est."[2][3]

Every declaratory law, although it have not words concerning the past, still by the very force of the declaration is by all means to be extended to the past. For the interpretation does not begin when it is declared; but, as it were, is made contemporaneous with the law itself. Wherefore, declaratory laws should never be enacted unless in those cases where the laws can look back with justice.[4]

Obscurity of law derives its origin from four things; either from the excessive accumulation of laws, especially when obsolete laws are mixed together, or from their description being ambiguous or not perspicuous and lucid, or from the methods of expounding the law being neglected or not properly pursued, or in fine, from the contradiction and vacillation of judicial decisions.[5]

[1] Aph. xlix. [2] "Non est integrum consilio jam uti tuo. (Cic. Pis. 24).
[3] Aph. l. [4] Aph. li. [5] Aph. lii.

Lord Bacon then proceeds to treat of the excessive accumulation of laws, and of the means of remedying such an evil. The prophet saith: "Pluet super eos laqueos."[1] But there are no worse snares than the snares of laws, especially penal, if in number vast and through course of time useless, they do not afford a light, but rather cast nets before our feet.[2]

There are two methods of framing new statutes. One establishes and strengthens the former statutes about the same subject matter, then adds and changes some things; the other abrogates and cancels all that was before decreed, and substitutes in entirety a new and uniform law. Lord Bacon approves of the latter method. For by the former decrees become complicated and perplexed; what presses at the moment is done well; but the body of the laws meanwhile is rendered corrupted. But assuredly greater diligence is to be used in the latter method, since the deliberation is on the very essence of the law, and the previous enactments are to be searched and weighed before the law be passed; but by this means the harmony of laws for the future best advances."[3]

It was a custom among the Athenians, that the contradictory titles of law, which they termed Antinomiæ, should be yearly examined by six persons, and whatever could not be reconciled were proposed to the people, that some certainty might be determined concerning them. According to which example those who have the power of framing laws in every state, every third or fifth year, as may seem fit, should review the contradictory laws.[4] But those should be first inspected and prepared, and

[1] Psal. x. 7. [2] Aph. liii. [3] Aph. liv.

[4] "As to the Antinomiæ, cases judged to the contrary, it were too great a trust to refer to the judgment of the composers of this work, to decide the law either way, except there be a current stream of judgments of later times, and then I reckon the contrary cases amongst cases obsolete, of which I have spoken before; nevertheless, this diligence would be used, that such cases of contradiction be specially noted and collected, to the end those doubts that have been so long militant may either, by assembling all the judges in the Exchequer Chamber, or by parliament, be put into certainty. For to do it by bringing them into question under feigned parties, is to be disliked.—'Nihil habeat forum ex scenâ.'"—*Lord Bacon's Proposal for Amending the Laws of England.*

finally exhibited to the general assembly, so that whatever may be approved may be established and settled by their suffrages.[1]

Nor should there be too scrupulous or anxious care to reconcile contradictory titles of law, and, as they say, to save all points by means of subtle and studied distinctions. For this is the web of wit, and however it may pretend a certain modesty and reverence, still is to be reckoned amongst prejudicial things; inasmuch as it renders the entire body of law ill-assorted and incoherent. It is absolutely better that the worse titles should give way, and the better stand alone.[2]

Obsolete laws, and those which have grown into disuse, no less than the contradictory titles—[antinomiæ]—should be proposed by the official delegates to be repealed. For since the express Statute cannot be regularly abrogated by disuse, it follows that through a contempt of obsolete laws, some loss of authority ensue in the rest. And a kind of Mezentian[3] torture ensues, that living laws perish in the embrace of the dead. But we must by all means beware of a gangrene in laws.[4]

So also in the case of obsolete laws and statutes, and not lately published, there should be jurisdiction in the Prætorian Courts to decide against them. For although it has been said well, "that no man should be wiser than the laws,"—neminem oportere legibus esse sapientiorem,—still this must be understood of the laws when they are awake, not when they are asleep. On the other hand, there should be no jurisdiction in the Equity Judges [Prætores] to afford relief against the more recent statutes, such as are understood to be injurious to public justice, but the jurisdiction should be left with the Sovereigns, High Councils, and Supreme Authorities, by means of suspending their execution through edicts or acts, until Parliaments, or assemblies

[1] Aph. lv. [2] Aph. lvi.

[3] Mezentius was King of the Tyrrheni when Æneas came into Italy. He invented a novel method of execution, tying the victim to a corpse, and letting him die in that condition.—(Virg. Æn. v. 648.)

[4] Aph. lvii.

of such a nature who have power to abrogate them, meet again, lest in the mean time the safety of the people be endangered.[1]

Lord Bacon next treats of digesting the law. For if laws accumulated upon laws swell into such vast volumes, or labour under such confusion, that it is expedient to revise them anew into a sound and working body, a digest of the laws ought to be compiled in preference to any other work.—Quod si leges aliæ super alias accumulatæ in tam vasta excreverint volumina, aut tantâ confusione laboraverint ut eas de integro retractare et in corpus sanum et habile redigere ex usu sit; id ante omnia agito, atque opus ejus modi opus heroicum esto atque auctores talis operis inter legislatores et instauratores rite et merito numerentur.[2]

In the proposal for amending the Laws of England, the way to reduce and compile the Laws of England is stated thus:—"This work is to be done, to use some few words, which is the language of action and effect, in this manner. It consisteth of two parts: the digest or recompiling of the common laws, and that of the Statutes. In the first of these, three things are to be done: 1. The compiling of a book 'de antiquitatibus juris;' 2. The reducing or perfecting of the course or corps of the common laws; 3. The composing of certain introductive and auxiliary books touching the study of the laws. For the first of these all ancient records in your Tower or elsewhere, containing Acts of Parliament, Letters Patent, Commissions, and Judgments, and the like, are to be searched, perused, and weighed; and out of these are to be selected those that are of most worth and weight, and in order of time, not of titles, for the more conformity with the year-books, to be set down and registered, rarely in hæc verba: but summed with judgment, not omitting any material part; these are to be used for reverend precedents, but not for binding authorities. For the second, which is the main, there is to be made a perfect course of the law *in serie*

[1] Aph. lviii. [2] Aph. lix.

temporis, or year-books, as we call them from Edward the First to this day. In the compiling of this course of law or year-books, the points following are to be observed: First. All cases which are of this day clearly no law, but constantly ruled to the contrary, are to be left out; they do but fill the volumes, and season the wits of students in a contrary sense of law. And so likewise all cases wherein that is solemnly and long debated, whereof there is now no question at all, are to be entered as judgments only, and resolutions, but without the arguments which are now became but frivolous. Yet for the observation of the deeper sort of lawyers, that they may see how the law hath altered, out of which they may pick sometimes good use, I do advise that upon the first in time of those obsolete cases there was a memorandum set, that of that the law was thus taken until such a time, &c. Secondly. Homonymiæ, as Justinian calleth them, that is, cases merely of iteration and repetition, are to be purged away; and the cases of identity, which are best reported and argued, to be retained, instead of the rest; the judgments, nevertheless, to be set down, every one in time as they are, but with a quotation or reference to the case where the point is argued at large; but if the case consist part of repetition, part of new matter, the repetition is only to be omitted."

The expurgation of such laws, and a new digest, may be accomplished in five ways: first, the obsolete laws, which Justinian calls old fables, may be omitted; next, out of the contradictory titles the most approved may be retained, the contrary repealed; thirdly, the coincident laws, or laws which import the same, and are nothing else than repetitions of the same thing, must be expunged, and that one of them which is most perfect may be retained in place of all; fourthly, if any laws determine nothing, but only propound questions, and leave them undecided, let them in like manner depart;[1]

[1] Similiter facessant, scil. se. Urbe finibusque facessere. (Liv. iv. 58.) Ab omni societate reipublicæ facessere. (Cic. Leg. I 13.)

lastly, let laws which are found to be too wordy and prolix, be abridged into a more narrow compass.[1]

But it will be by all means very useful, in a new digest of laws, to sort and arrange apart first laws received as matters of common right,—leges pro jure communi receptas, which, as it were, are immemorial in their origin; and in the next place the Statutes[2] superadded from time to time; since in many instances, the interpretation and administration of Common Law and of Statutes are not the same in pronouncing judgment. This Tribonian has done in the Digest and Code.[3]

But in the regeneration and novel structure of laws of this description the words and text of the old laws and books of the law should be retained precisely. Though we must necessarily collect them by cantos and small portions, then arrange them in order. For although perhaps this might be performed more conveniently, and even, if we regard right reason, better by

[1] Aph. lx.

[2] "For the reforming and recompiling of the Statute Law, it consisteth of four parts:—1. The first to discharge the books of those Statutes, where the case by alteration of time is vanished; as Lombards, Jews, Gauls, half-pence, &c. Those may, nevertheless, remain in the libraries for antiquities, but no reprinting of them. The like of Statutes long since expired and clearly repealed: for if the repeal be doubtful, it must be so propounded to the Parliament. 2. The next is to repeal all Statutes which are sleeping and not of use, but yet snaring and in force; in some of those it will perhaps be requisite to substitute some more reasonable law instead of them, agreeable to the time; in others a simple repeal may suffice. 3. The third, that the grievousness of the penalty in many Statutes be mitigated, though the ordinance stand. 4. The last is the reducing of concurrent Statutes, heaped upon one another, to one clear and uniform law. Towards this there hath been already upon my motion, and your Majesty's directions, a great deal of good pains taken; my Lord Hobart, myself, Sergeant Finch, Mr. Heneage Finch, Mr. Noye, Mr. Hackwell, and others, whose labours being of a great bulk, it is not fit now to trouble your Majesty with any further particularity therein; only by this you may perceive the work is already advanced: but because this part of the work which concerneth the Statute Laws must, of necessity, come to Parliament, and the Houses will best like that which themselves guide, and the persons that themselves employ, the way were to imitate the precedent of the Commissioners for the Canon Laws in 27 Hen. VIII., and 4 Edw. IV., and the Commissioners for the union of the two realms, primo of your Majesty, and so to have the Commissioners named by both Houses; but not with a precedent power to conclude, but only to prepare and propound to Parliament."—*Lord Bacon's Proposal for Amending the Laws of England.*

[3] Aph. lxi.

means of a new text than by a patch-work of this kind, still in laws we must regard not so much the style and description as authority, and the patron thereof, antiquity. Otherwise a work of this kind might seem a certain scholastic business and method rather than a body of imperative laws.[1]

In the new digest of laws, care must be taken that the old volumes should not be altogether destroyed and go into oblivion, but that they should at least remain in libraries, although their vulgar and promiscuous use may be prohibited. For in the weightier causes it will not be without use to consult and inspect the changes and series of past laws; but it is at least usual to sprinkle antiquity over the present. But this new body of laws must be absolutely confirmed by those who in the individual polities have legislatorial power; lest perchance under pretext of digesting the old laws new ones be secretly imposed.[2]

It were to be wished that the instauration of laws of this kind were undertaken in those times which in learning and the knowledge of things excel the more ancient, whose acts and works they retrace—which fell out otherwise in the work of Justinian. For it is an unfortunate thing when the works of the ancients are mutilated, and recompiled by the judgment and choice of a less wise and learned age.[3]

Obscurity in the drafting of laws arises either from their loquacity and verbosity, or again from their excessive brevity, or from the preamble of the law being inconsistent with the very body of the law.[4]

The loquacity and prolixity used in writing down laws is censurable. For such a writer does not by any means attain what he wishes and aims at, but rather the contrary. For whilst he strives to frame and express individual particular cases in apt and proper words, expecting a greater certainty by this means, on the contrary he causes many questions to arise concerning the words themselves, so that a sound and true interpreta-

[1] Aph. lxii. [2] Aph. lxiii. [3] Aph. lxiv. [4] Aph. lxv.

tion, according to the gist of the law, proceeds with difficulty, by reason of the din of words.[1]

Neither therefore is a too concise and affected brevity for sake of dignity, and, as it were, more imperatorial, to be approved of; especially in these times, lest law become perchance like a Lesbian Rule.[2] Wherefore a middle course is to be pursued; and a well-stated generalization of words is to be sought after, which, although it do not thoroughly sift the cases comprehended, still may exclude those not clearly comprehended.[3]

Still, in ordinary and political laws and edicts, in which for the most part no one employs counsel, but trusts his own judgment, all things must be explained more amply, and as it were pointed out with the finger, for the comprehension of the vulgar.[4]

Lord Bacon does not approve of the preambles of acts of parliament,—which formerly were considered impertinent, and which introduce disputing, not commanding, laws. Yet we cannot abolish ancient customs. But these preambles of laws for the most part, as times now go, are necessarily employed, not so much for the explanation of the law as for persuasion to pass the law in parliament; and again to give satisfaction to the people. So far as possible, however, let preambles be avoided; and the law begin with a command.[5]

Although the intention and meaning of a law sometimes may not improperly be drawn from prefaces and preambles; still its latitude and extension ought by no means to be drawn from thence. For a preamble often lays hold of some of the most plausible and specious passages by way of example, when the law at the same time comprises many things more; or, on the contrary, the law restrains and limits many cases, the reason of which limitation it would not be necessary to insert in the preamble, wherefore the dimension and latitude of

[1] Aph. lxvi.

[2] The Lesbians are said to have made their rules from their buildings. Thus, if their buildings were erroneous, the rules they worked by became so too, and thus propagated the error.

[3] Aph. lxvii. [4] Aph. lxviii. [5] Aph. lxix.

a law must be sought from the very body of the law itself; for a preamble often falls either on the one side or the other.[1]

But there is a very vicious method of drafting laws. That is to say, when the case at which the law aims is expressed at large in the preamble; then by means of the word "such," or some similar relative, the body of the law is turned back into the preamble, whence the preamble is inserted and incorporated with the law itself. This practice is obscure and unsafe; because the same diligence is not wont to be taken in weighing and examining the words of the preamble as is employed in the very body of the law itself.[2]

The methods of expounding law and of solving doubts are five. For this is done either by means of the reports of judgments, or by authentic writers, or by auxiliary books, or by lectures, or by the answers or opinions of wise men. All these, if they be well appointed, will be great helps against the obscurity of the laws.[3]

Above all, the judgments delivered in the superior courts, and in the weightier causes, especially the doubtful, which have some difficulty or novelty in them, should be taken with diligence and faith. For judgments are the anchors of laws, as laws are the anchors of the State.[4]

The following admirable rules are given on the subject of reporting:—Report the cases precisely, the judgments themselves exactly. Annex the reasons for the judgments which the judges themselves have given. Do not mingle the authority of cases adduced for example with principal cases. As for the perorations of advocates, unless there be something very excellent in them, pass them over in silence.[5]

Lord Bacon considered that the persons to collect judgments of this kind should be selected from the most learned advocates, and receive a liberal remuneration from the State. However, this opinion is erroneous. At the present time private enterprise is quite

[1] Aph lxx. [2] Aph. lxxi. [3] Aph. lxxii. [4] Aph. lxxiii. [5] Aph. lxxiv.

sufficient to bring out the reports in the best manner. And without making any invidious comparisons, it is sufficient to say that experience proves that reports edited by persons directly interested in their sale will always be superior to those edited by salaried officials. The judges should not meddle with these reports, lest, perchance, bound to their own opinions, and supported by their own authority, they transcend the limits of a reporter.[1]

These reports should be digested in the order and series of time, not by method and titles. For these writings are, as it were, the histories or narratives of the laws. Nor do the decrees alone, but their very dates also, afford light to a prudent judge.[2] Some of the old reporters, as Salkeld, give the cases under titles; but the modern reports are usually in chronological order.

The body of the law should be constructed only of the laws themselves, which constitute the common law, next, of the constitutions,[3] or statutes, thirdly, of the reported judgments of the judges.[4]

Nothing so much concerns the certainty of laws, as that authentic writings be confined within moderate bounds, and that the excessive multitude of authors and doctors of the law be discarded;—whereby the meaning of laws is distracted, the judge confounded, judicial proceedings made eternal, and the advocate himself, when he cannot read through and overcome so many books, runs to abridgments. Perhaps some good glossary, and a few classical writers, or rather a few portions of some writers, may be received as authentic. Of the rest, no less, some use may remain in libraries, so that judges or advocates, when there may be occasion, may inspect their treatises; but in pleading causes permission should not be given to cite them in court, nor should they pass into authority.[5]

[1] Aph. lxxv. [2] Aph. lxxvi.

[3] This term is borrowed from the name of the imperial edicts, promulgated under the sole authority of the Roman Emperor.

[4] Aph. lxxvii. [5] Aph. lxxviii.

The knowledge and practice of law should not be deprived of, but rather provided with, auxiliary books.[1] These are six in species:—Institutes,—On the Signification of Words,—On the Rules of Law,—The Antiquities of Laws,—Abridgments,—Forms of Practice.[2]

Young students and novices are by means of Institutes to be prepared for science, and to receive and imbibe the difficulties of the laws more profoundly and conveniently. These institutes should be composed in a clear and perspicuous order. In them the entire body of private law should be analysed; not passing by some titles, or dwelling too long on others, but briefly touching[3] on every subject, so that to one proceeding to read through the body of the laws nothing may display itself altogether new, but preconceived by some slight notion. The public law should not be discussed in institutes; but let this be drawn from the very fountains.[4]

A commentary on the vocabulary of Law, or Law Dictionary should be compiled. In the explanation of terms, and rendering their sense, labour should not be expended too curiously or laboriously. For the business here is not that the definitions of words be exactly sought out, but those explanations only which

[1] "For the auxiliary books that conduce to the study and science of the law, they are three:—Institutions; a treatise 'De regulis juris;' and a better book, 'De verborum significationibus,' or, terms of the law. For the Institutions I know well there be books of introductions, wherewith students begin, of good worth, especially Littleton's and Fitzherbert's 'Natura brevium;' but they are no ways of the nature of an institution; the office whereof is to be a key and general preparation to the reading of the course. And principally it ought to have two properties,—the one a perspicuous and clear order or method; and the other, an universal latitude or comprehension, that the students may have a little prenotion of every thing, like a model towards a great building. For the treatise 'De regulis juris,' I hold it of all other things the most important to the health, I may term it, and good institutions, of any laws: it is, indeed, like the ballast of a ship, to keep all upright and stable; but I have seen little in this kind either in our laws or other laws that satisfieth me. The naked rule or maxim doth not the effect: it must be made useful by good differences, ampliations, and limitations, warranted by good authorities, and this not by raising up of quotations and references, but by discourse and deducement in a just tractate."—*Lord Bacon's Proposal for the Amendment of the Laws of England.*

[2] Aph. lxxix.

[3] Literally tasting,—delibando.

[4] Aph. lxxx.

may open an easier way to reading the books of law. This treatise should not be digested by the letters of the alphabet. That should be left to an index; but such words should be collected together as concern the same subject so that for the purpose of comprehension one may be an aid to the other.

A good and diligent treatise on the different Rules of Law conduces more than any thing else to the certainty of laws. It is worthy to be intrusted to the greatest wits and most learned lawyers. But not only common and vulgar rules are to be collected, but also others more subtle and recondite, which may be extracted from the harmony of laws and adjudicated cases; such as are found sometimes in the best rubrics; and are the general dictates of reason, which run through the different materials of law, and are, as it were, the Ballast of the Law :—Ad certitudinem legum facit, si quid aliud, tractatus bonus et diligens de diversis regulis juris. Is dignus est, qui maximis ingeniis et prudentissimis jure-consultis committatur. Neque enim placent, quæ in hoc genere extant. Colligendæ autem sunt regulæ, non tantum notæ et vulgatæ, sed et aliæ magis subtiles et reconditæ, quæ ex legum et rerum judicatarum harmoniâ extrahi possint; quales in rubricis optimis quandoque inveniuntur : suntque dictamina generalia rationis, quæ per materias legis diversas percurrunt, et sunt tanquam suburra legis.[1]

But individual Decrees or Placits of the law are not to be taken in the light of Rules, as is wont to be done ignorantly enough. For if this were received, there would be as many rules as laws. For a law is nothing else than an imperative rule. But those rules should be accepted which cleave in the very form of justice itself; from whence, for the most part, the same rules are commonly found through the civil laws of different states; unless perhaps they vary on account of reference to the forms of polities.[2]

After the rule being announced in a brief and sub-

[1] Aph. lxxxii. [2] Aph. lxxxiii.

stantial compass of words, there should be added examples and the most lucid decisions of cases, by way of explanation ; distinctions and exceptions by way of limitation ; and cognate points by way of amplification, of the same rule.[1]

It is well ordained that the law be not taken from rules ; but the rule from the law in force. Neither is a proof to be taken from the words of a rule, as if it were a text of the law. For a rule indicates only, and does not determine a law,—as the needle points to the pole.[2]

Besides the body of the law itself, it will be of use also to survey the antiquities of the law, to which reverence still remains due, although their authority may have vanished. But the writings concerning laws and judgments should be considered as the antiquities of the laws, which in time preceded the very body of the laws whether they were published or not. For a loss of these must not take place. Wherefore the most useful amongst them should be selected,—for many things will be found empty and frivolous,—and collected in one volume, lest, as Tribonian says, "old fables be mixed with laws."[3]

But it is of much importance in practice, that the whole law be digested in order into divisions and titles, to which every one may recur suddenly, as occasion shall be given, as to a storehouse furnished for present use.[4] Books of abridgments of this kind both reduce into order what was dispersed, and abbreviate what was diffuse and prolix in the law. But we must take care lest these summaries render men ready in practice, loiterers in the science itself. For their use is such, that through them the law may be recalled to mind, but not learned thoroughly. But these summaries are by all means to be collected with great diligence, faith, and judgment, lest they commit a theft on the laws.[5]

The different forms of pleading of every kind should be collected. For this is of importance to practice ; and assuredly these disclose the oracles and mysteries of the laws. For there are many things which lie hidden in

[1] Aph. lxxxiv. [2] Aph. lxxxv. [3] Aph. lxxxvi.
[4] Veluti in promptuarium paratum ad præsentes usus. [5] Aph. lxxxvii.

laws, but in forms of pleading are better and more largely displayed, like the fist and the open palm,—instar pugni, et palmæ.[1]

Some course must be taken from the determining and solving of particular doubts which arise from time to time. For it is hard that those who might desire to beware of error should not find a guide to the way ; but that their very acts should be hazarded, and that there should not be any method of knowing the law before the business was transacted.[2]

The opinions of the learned, which are given in law, either by advocates or doctors, should not be of such authority that it may not be lawful for the judge to depart from their opinion. Let law be taken from sworn judges,—Jura a juratis judicibus sumunto.[3]

Nor should judgments be obtained through means of feigned issues and persons. For it dishonours the mystery of laws, and is to be considered as a sort of prevarication. But it is disgraceful for a court of justice to borrow any thing from the stage.[4]

Wherefore, the decrees, as well as the answers and opinions, should proceed from the judges alone; the former concerning pending suits, the latter concerning difficult questions of law in argument. These decisions, whether in private or in public matters, should not be required from the judges themselves,—for if this were to happen, the judge would change into an advocate,—but from the prince or state. By these let them be given in charge to the judges. And let the judges, supported by such authority, hear the discussions of advocates, or of those employed by whomsoever it concerns, or assigned by the judges themselves, if need be ; and the matter being deliberated, let them deliver and declare the law. Opinions of this kind should be recorded and published as the regular judgments, and be of equal authority.[5]

Lectures on law, and the exercises of those who apply themselves to and bestow their labours on the study of the law, should be so instituted and ordered, that all

[1] Aph. lxxxviii. [2] Aph. lxxxix. [3] Aph. xc. [4] Aph. xci. [5] Aph. xcii.

may tend rather to settle than disturb questions and controversies in the law. For, as now happens, a school is generally set up amongst all, and is opened for the multiplication of altercations and questions on the law, as it were, for the sake of displaying wit. And this is an old disease. For even amongst the ancients, it was as it were a glory by sects and factions rather to cherish than extinguish many questions concerning law. Good heed should be taken lest this occur.[1]

Judgments vacillate either on account of a premature and too hasty sentence, or on account of the rivalry of courts, or on account of a bad and unskilful reporting of judgments, or by reason of a too easy and ready way being afforded to rescind them. Wherefore we must take care that judgments issue forth, mature deliberation having been made beforehand; and that courts mutually revere one another; and that judgments be reported faithfully and prudently; and that the way to repeal judgments be narrow, rocky, and strewed, as it were, with caltraps[2].[3]

If judgment shall have been awarded on any case in any principal court in a doubtful case, and a similar case shall have happened in another court, final judgment should not be given before a consultation in some greater assemblage of judges. For awarded judgments, if they must be repealed, should be at least interred with honour. —Judicia enim reddita, si forte rescindi necesse sit saltem sepelientur cum honore.[4]

That courts should struggle and contest about jurisdiction is human frailty; and this the more, because by a certain vain conceit that it is the part of a good and active judge to enlarge the jurisdiction of the court,—quod boni et strenui sit judicis, ampliare jurisdictionem curiæ,—this intemperance is plainly encouraged, and a spur given where there is need of a bridle. But that

[1] Aph. xciii. [2] Aph. xciv.

[3] "Et tanquam muricibus strata." Murices,—lance-heads thrown to annoy the enemy's horse in charging.—"Murices ferrei in terram defixi."—*Curt.* iv. 53.

[4] Aph. xcv.

out of this contention of spirits, courts should readily rescind judgments awarded on one side and the other is an intolerable evil; plainly to be punished by Kings, or Senate, or the State. For it is a matter of the worst example, that courts which distribute peace to subjects should practise duels amongst themselves.[1]

There should not be too easy or ready an access to the reversal of judgments by appeals, or writs of error, or revisals, and the like. It is received amongst some, that a suit may be brought to a superior tribunal, as a matter in its integrity; but amongst others, that the judgment itself may remain in force, but its execution only stayed. Lord Bacon approves of neither plan; unless the courts in which judgment was given were humble and of the inferior kind; but rather that the judgment stand, and its execution proceed; only let surety be given by the defendant for damages and expenses, if the judgment be reversed.

In conclusion, he says that this title concerning the certainty of Laws may suffice for the example of the remainder of the Digest[2] which he was then planning.

The eulogy of Lord Bacon upon the laws of Henry VII. has frequently been quoted. "His laws (whoso

[1] Aph. xcvi.

[2] Digestum Juris Anglicani; sacrum justitiæ templum; opus sane regium, sed nondum conditum; quod tuo seculo, Excellentissime Principum, instaurandum, tui nominis æternitati consecrandum reservatur.

"Your Majesty is a great master in justice and judicatures, and it were a pity the fruit of that your virtues should not be transmitted to the ages to come. Your Majesty also reigneth in learned times, the more, no doubt, in regard of your own perfection in learning, and your patronage thereof. And it had been the mishap of works of this nature, that the less learned time hath sometimes wrought upon the more learned, which now will not be so. As for myself, the law was my profession, to which I am a debtor: some little helps I have of other arts, which may give form to matter; and I have now, by God's merciful chastisement, and by His special providence, time and leisure to put my talent, or half talent, or what it is, to such exchanges as may perhaps exceed the interests of an active life. Therefore, as in the beginning of my troubles, I made offer to your Majesty to take pains in the story of England, and in compiling a method and digest of your laws, so have I performed the first, which rested but upon myself in some part; and I do in all humbleness renew the offer of this latter, which will require help and assistance to your Majesty if it shall stand with your good pleasure to employ my service therein."—*Lord Bacon's Offer to King James, of a Digest to be made of the Laws of England.*

marks them well) were deep and not vulgar; not made upon the spur of a particular occasion for the present, but out of providence for the future; to make the estate of his people still more and more happy, after the manner of the legislators in ancient and heroic times." However little this eulogium may have been merited, it is important to notice the grand philosophic distinction between deep and vulgar laws, "the former invariably aiming to accomplish their end, not by giving any sudden shock to the feelings and interests of the existing generation, but by allowing to natural causes time and opportunity to operate; and by removing those artificial obstacles which check the progressive tendencies of society."[1]

The critique of Mr. Hume upon the legislation of the same reign is more apposite. He observes that the statutes of Henry VII., relating to the police of his kingdom, are contrived with more judgment than his commercial regulations:—"The more simple ideas of order and equity are sufficient to guide a legislator in every thing that regards the internal administration of justice; but the principles of commerce are more complicated, and require long experience and deep reflection to be well understood in any state. The real consequence is there often contrary to first appearances. No wonder then, that in the reign of Henry VII., those matters were frequently mistaken; and it may safely be affirmed that even in the age of Lord Bacon, very imperfect and erroneous ideas were found on the subject. . . . . During the reign of Henry VII., it was forbidden to export horses, as if that exportation did not encourage the breed, and make them more plentiful in the kingdom. Prices were also affixed to woollen cloths, to caps and hats, and the wages of labourers were regulated by law. It is evident that these matters ought always to be left free, and be intrusted to the common course of business and commerce. . . . For a like reason, the law en-

[1] Stewart.

acted against inclosures, and for the keeping up of farm houses, scarcely deserves the praises bestowed upon it by Lord Bacon. If husbandmen understand agriculture and have a ready vent for their commodities, we need not dread a diminution of the people employed in this country. During a century and a half after this period, there was a frequent renewal of laws and edicts against depopulation; whence we may infer that none of them were ever executed. The natural course of improvement at last provided a remedy."

Lord Bacon's offer to King James to digest the laws of England was not accepted. And this "digestum juris Anglicani, opus sane regium, nondum conditum" has never yet been attempted except in the digest of individual portions of the law. In the Preface to the "Novum Organon," Lord Bacon said:—"et mortuus fortasse id effecero, ut illa posteritati, nova hac face in philosophiæ tenebris, prælucere possint." But the light which the great father of the inductive method held up in the obscurity of the Philosophy of Law has been disregarded by the technical race of lawyers in England. "The lapse of 250 years," said Sir Robert Peel,[1] "has increased the necessity of the measure which Lord Bacon then proposed; but if he has produced no argument in favour of the principle, there is no objection adverse to it, which, to use the words of Cowley applied to Bacon himself, 'from the mountain-top of his exalted wit' he did not anticipate."

2. Thomas Campanella, 1568–1639.

Realis Philosophiæ Epilogisticæ partes IV.: hoc est, De Rerum Nâturâ, Hominum Moribus, Politica, cui Civitas Solis adjuncta est Œconomica cum adnotationibus Physiologicis a Tobia Adamo nunc primun edita. Francf. ad M. 1623, 4to.

Campanella,[2] like Bacon, his contemporary, attempted to deduce all knowledge from nature and experience. He was educated by the Dominicans in the

[1] House of Commons, March 9, 1826.

[2] Thomas Campanella, born at Stilo, in Calabria, 1568, died 1639.

convent of Cozenza. According to him the object of Ethical, Economical, and Political Science is the world of human volition. The aspiration of ages, as well as the penetration of science, point to the termination of all evils; but they can only cease in the kingdom of God; which kingdom does not admit of divisions, but unites all nations and all forms of government under the Messiah. He drew a picture of an ideal human society in the kingdom of God in his work *Civitas Solis*, and he represented this ideal as the aim of the historical development of humanity. He was one of the first modern socialists.

Campanella is styled, by his compatriots, the Bacon of Italy. He founded his philosophy on the evidence of the senses, on history (that is to say, the description of objects), on the physical consciousness of our existence, and, in fine, on our triple nature of knowledge, will, and action. Campanella, according to the belief of the age in which he lived, practised magic and astrology. He believed that the oracles of antiquity had spoken by a miracle of God; and he pointed out in history many legislators, amongst others Romulus, as sent by Satan. But despite his errors and his empiricism he preceded in a remarkable manner the optimism of Leibnitz. God, says Campanella, is a radical unity, the source of all absolute truth, all powerful being, infinite goodness, supreme wisdom. Evil is nothing but a simple negation; pain is the cessation of good; weakness, hatred, ignorance are the negations of the power, love, and wisdom of God. By these very negations good is effected. Famine compels men to travel—hence the arts and sciences ; wars destroy tyrants ; error excites the search after truth. Everywhere evil is the occasion of good.

The politics of Campanella united the two ideas of the universal monarchy of the Pope, and the republic of Plato. In the *Civitas Solis* Campanella speaks of the island which the Grand-Admiral of the Spanish fleets has discovered in the ocean. In this island there is community of property. There, nothing is done accord-

ing to the will of the individual; and all is submitted to religion; all obey the high priest of wisdom. Whenever Campanella spoke of the revolution which would regenerate the earth, of the novel unity which would arise, he thought of the fusion of all nations upon the cessation of war, pestilence, and famine; he saw the globe civilized by the united efforts of the human race; and he was ready to pass the limits of his own age to announce the theory of progress. "We have advanced more," said he, "during these last hundred years, than the whole world in 4,000 years; we have printed more books during the last century than during 5,000 years. Printing, gunpowder, the compass will revolutionize the world; astrology announces to us that there is ready to arise a new universal monarchy, with new arts, new laws, new prophets; but we must first destroy, then rebuild." In the philosophy of Campanella there is the commencement of many great ideas; we see him weigh the innovations of Bacon, and develop a system as to the progress of nations; but all is paralysed by innumerable contradictions.

Campanella attacked the philosophy of Aristotle; and the enmity of his opponents obliged him to quit Naples. For ten years he travelled over Italy: and was intimate with Sarpi, at Venice, and Galileo, at Florence. On his return to Calabria a conspiracy burst forth, the object of which was to drive the Spaniards from Naples. Campanella was believed to be the soul of the conspiracy. Taken prisoner, he passed twenty-seven years in the prisons of Naples, in the midst of horrible sufferings; and he continued an author only because it was impossible to conquer the devouring activity of his mind. They took from him his manuscripts, his treatises; he reproduced them with an inconceivable perseverance and rapidity, even in the prisons, and in the presence of his guard; but solitary, humbled, forced to vile flatteries, there was nothing to support and encourage his genius. Naples has not been a fortunate school for jurists.

3. Grotius, 1583–1646.

Authorities:—Vita H. Grotii: Lugd. Batav., 1704, 4to. (Lehmann); Grotii Manes ab iniquis obtrectationibus vindicati, Delft, 1721; Life of Grotius, by Brand and Cattenberg, Dordr., 1727–1732, (2 vols. fol. Dutch): Vie de M. Hugo Grotius, par Burigni, Paris, 1752, 2 vols. 12mo; Translated into English, London, 1754: "Grotius," Bayle's Dict.; Chalmer's Dict.; Butler's Life of Grotius, London: Murray, 1826.

Works on Law and Jurisprudence: De Jure Belli et Pacis, Libri Tres, Paris, 1625; ib. cum commentariis G. Vander Muelen, 2 vols. 4to., Amsterdam, 1704; ib. translated into English, 3 vols. 8vo., London, Brown, 1715; by Whewell, 3 vols. 8vo., Cambridge, 1853; (and translated into most European languages); best edition, 4 vols. 4to., Lausanne, 1751; Mare Liberum, 12mo. Lugd. Batav., 1609; Florum Sparsio ad Jus Justiniancum, 4to., Paris, 1642. Introduction to Dutch Jurisprudence (Hubert's translation, London, 1845).

Whilst the dark period of European politics continued, of which Machiavelli, in the "Prince," has transmitted to us a gloomy picture—whilst the politics of statesmen continued to be little else besides treachery and corruption, a great jurist, Hugo Grotius, appeared, and devoted his abilities to the service of mankind. With the seventeenth century commenced a free, progressive spirit of inquiry into the principles and laws of human knowledge. The great steps made in the physical and mathematical sciences by Copernicus, Galileo, and Kepler, awakened a like enthusiasm amongst students of another class; and Grotius now carried the researches of philosophy from External Nature into the questions of Civil Right further than any writer on the same subject since the revival of learning in Europe.

The seventeen provinces of the Netherlands had come principally by marriage to the House of Austria. Mary, the only daughter of Philip the Good, Duke of Burgundy, was the heiress of fourteen. She married the Emperor Maximilian. By her he had two sons, the Emperor Charles V., and Ferdinand. The laws and government of these provinces resembled the constitution of England; each province had its representative assembly composed of the three orders—the clergy, nobility, and burghers; each had its courts of justice, and an appeal from the

superior tribunal of each lay to the supreme court at Mechlin. Under this government the people flourished in wealth and the arts.

Charles V. made over his hereditary territories in Germany to his brother Ferdinand; the Netherlands he annexed to the Crown of Spain. With the Crown of Spain they descended to Philip II., the only son of Charles V.

Religious and political dissensions, combined with the ill-advised measures of the Court, produced the rebellion which terminated in the independence of the Netherlands. In 1566, the celebrated petition was presented to Margaret of Austria, by a deputation of gentlemen headed by Lewis of Nassau. The Austrian courtiers nicknamed the deputation *gueux*—beggars, from the plainness and coarseness of their dress. And the nickname was retained by the popular party through all the troubles that followed. Similarly the French Protestants and American Republicans assumed, with pride, the nicknames of Huguenot and Yankee.

Philip II. sent the Duke of Alva, with 20,000 men, into the Netherlands in the year 1579. Frightful atrocities were committed. William, Prince of Orange, was declared Stadtholder by the insurgent states.

In 1581 the deputies of the States assembled at Amsterdam, solemnly renounced allegiance to Philip and his successors. In their manifesto they declared that "the prince is made for the people, not the people for the prince. . . . The prince who treats his subjects as slaves is a tyrant whom his subjects have a right to dethrone when they have no other means of preserving their liberty."

In 1584, the Prince of Orange was assassinated by Gerard: the war continued until 1609, when it was suspended by a truce of twelve years. At its expiration the war again burst forth, nor terminated until the peace of Westphalia, in 1648, when the independence of the Seven United Provinces was acknowledged.

It was thus with propriety that the Dutch Republic produced the great author of Modern International Law since the very existence of that State sprung from the

commencement of those European combinations which have resulted in the balance of power: whilst furious civil strife, imprisonment, and exile, gave Grotius the melancholy leisure to perfect a work on the general policy of states, instead of directing his talents to the administration of affairs in his native land.

Hugo Grotius—Dutch, Hugo de Groot—was born at Delft in 1583, of a distinguished family. If the contemplation of the pursuit of literature under difficulties be the most instructive and interesting feature in the biographies of men of genius, it gives almost equal pleasure to observe the successful literary career of Grotius, born with every advantage, and neglecting no opportunity. In early youth he displayed extraordinary genius, and at the age of eleven was sent to the University of Leyden. Whilst there he excited the admiration of his tutors, and of all his contemporaries by industry, learning, and intellect matured beyond his years. Joseph Scaliger condescended to direct the literary attempts of the boy: and Donza, one of the now forgotten luminaries of the University, declared, in verse, that Erasmus did not promise so much as Grotius at his age, and that he would soon bear comparison with the most learned of the ancients. In 1587, at the age of fifteen, he accompanied into France the Grand Pensionary Barneveldt, whom the States-General sent in an embassy to Henry IV. The King distinguished the youthful Grotius. He decorated him with a chain of gold, and introduced him to the Court, saying—Voila le miracle de la Hollande! There is no record in history of any person acquiring at an age equally early the scientific reputation which attended the first publications of Grotius.

In 1600, after other works, Grotius published his Aratæa, a precious monument of the astronomical wisdom of the ancients. The Aratæa, or Phenomena of Aratus, is a poetical treatise of that author upon astronomy, with Cicero's translation so far as it has reached us: nor is the Latinity of Grotius in supplying the deficiencies much inferior. He now conceived the idea of writing the history of the great events in the midst of

which his country played so distinguished a part; and was partly determined to this by the advice and example of the illustrious De Thou. On the proposition of Barneveldt the States-General nominated Grotius their historian in 1601. In 1607 he was appointed Advocate-fiscal-General of Holland. This wonderful success in early life may well surprise modern lawyers. Affairs have changed. It is not possible in the nineteenth century, and in England, to be, like Grotius, in great practice at seventeen, and Attorney-General at twenty-four. In 1608, Grotius wrote his treatise on the liberty of the seas. The pretensions of the Spaniards to the exclusive trade of the Indies, and of the English to the exclusive navigation and fisheries of the British seas, gave birth to it. Accordingly, in the treaty of 1609, between Spain and the United Provinces, the right of navigation and free trade to the Indies was granted to the Republic. In consequence of the dispute between England and the States-General upon the exclusive right claimed by the former to fish in the northern seas, Grotius was sent to England, as Commissioner, to settle the matter. He was courteously received by the Court, but the strong hand of England carried the point. In the Mare Liberum, Grotius showed that the sea was, from its nature, incapable of being exclusively appropriated. Selden, in answer to this work, wrote the Mare Clausum.

This treaty between Spain and the Provinces, for a truce of twelve years, after a war of forty years, had been concluded against the advice of the Stadtholder, Prince Maurice, and principally through the means of Barneveldt, to whose party Grotius was most warmly attached. The Stadtholder considered that the war would aid his own ambitious views, whilst the Republican party considered that the aggrandisement of the House of Orange would prove the extinction of the liberties of their country. Hence the Grand Pensionary and his friends became daily more odious to the Prince. Political dissension was complicated with religious quarrels. In the controversy on predestination and grace,

Gomarus followed the doctrines of Calvin; Arminius, those of Melancthon and Erasmus. The influence of the Stadtholder was entirely in favour of the Calvinists; and Barneveldt, Grotius, with the other leading Arminians, became the object of the grossest calumnies. A coup d'etat followed. In 1617, Prince Maurice, at the head of an army, seized the principal towns in the interest of the opposite party; and the leaders of the Arminian party were arrested and thrown into prison.

The Synod of Dort was opened on the 13th of May, 1618; and never did the odium theologicum display itself with more ferocity. The Synod sat for six months, and was closed by a speech of the president declaring that its miraculous labours had made hell tremble. Its members disputed, but "found no end, in wandering mazes lost." The contemporary critique on the labours of this famous convocation may be inserted:

> "Dordrechti synodus, nodus; chorus integer, æger;
> Conventus, ventus; sessio, stramen. Amen!"

In the meantime, Barneveldt, after the mockery of a trial, was condemned and executed on the same day. Grotius was sentenced to perpetual imprisonment. His escape from his prison, the Castle of Louvestein, is remarkable as an exact historical parallel to that of Lavalette from the Conciergerie in Paris, in 1815. The wife of Grotius was allowed to share his imprisonment. Nor was he prevented from the relaxations of study, and whilst a hopeless prisoner, he there composed his Introduction to Dutch Jurisprudence. The books which he required were usually brought in a large trunk; and the gaolers accustomed to see it constantly pass and repass, neglected to search it on every occasion. On the 21st of March, 1621, the illustrious prisoner escaped concealed in this trunk, whilst his wife took his place, and under the pretence of the sickness of the prison, concealed his escape for some days. Flying to Paris, he there resumed his literary labours, and soon published his great work, De Jure Belli et Pacis. He never per-

manently returned to his native land. Baffled and ruined in political life, he found that literature is yet a better comfort in adverse fortune, than it is an ornament in prosperity.

For some years before his death, at the instance of Chancellor Oxenstiern, he had been the ambassador of Queen Christina of Sweden at the Court of Louis XIII. This appointment he resigned in 1645; and died shortly after, aged sixty-three years, an exile from an ungrateful country.

The singular progress in politics which Grotius had made beyond his age is perhaps best shown by his having conceived the idea of an Amphictyonic tribunal of the European powers, to decide international disputes, and remove for ever the scourge of war with all the horrors in its train.[1] His great work at once achieved a reputation; Gustavus Adolphus never travelled without it; Charles Lewis, the Elector Palatine, forthwith ordered it to be taught publicly in his University of Heidelberg, and founded a professor's chair for the express purpose of teaching the law of nature and nations. In thirty years it was taught at all the principal universities of continental Europe; and within sixty years it was regarded as the authoritative text book of all international law.

Grotius gives in the preface[2] his reasons for writing his treatise De Jure Belli. He saw throughout the Christian world a licentiousness in fighting, which even barbarians would be ashamed of—a recourse to arms upon trivial or even no causes; and once they were taken up no regard for divine or human law. Hence some, like Erasmus, had denied the lawfulness of war to a Christian. But this had been injurious, because men discovering things that have been urged too far by such philosophers are apt to slight their authority in other matters. A cure, therefore, was to be applied to both these cases, as well to prevent believing that nothing as that all things were lawful.[3] He was also desirous to promote by his private

[1] De Jure Belli, lib. ii. c. 23, s. 8. [2] Proleg s. 28. [3] Ib. s. 29.

study Jurisprudence, which he formerly practised in public employment, this being the only thing left for him to do, unworthily banished from his native country, which he had honoured with so many of his labours.[1]

Grotius defined Jurisprudence as the science which teaches us to live according to Justice; and he defined Justice as a moral virtue or disposition of the mind to do what is equitable.[2] This definition is to be remembered in the perusal of his works on International Law. His first care in the treatise De Jure Belli was to refer the proofs of those things that belong to the Law of Nature to some certain ideas which no one can deny without doing violence to his judgment.[3] Towards the proof of this law he made use of the testimonies of philosophers, historians, poets, and, in the last place, orators; not as if they were implicitly to be believed, for it is usual with them to serve their own party or argument. But when many men of different times and places unanimously affirm the same thing for truth, this ought to be ascribed to an universal cause, which in such questions as these can be nothing else than either a right deduction from the principles of nature, or else some common agreement. The former shows the Law of Nature, the latter the Law of Nations, the distinction between which is not to be understood from the language of these testimonies—for writers are prone to confound the two expressions *jus naturæ* and *jus gentium*—but from the nature of the subject. For whatever cannot be clearly deduced from true premises, and yet appears to have been generally admitted, must have had its origin in free consent.[4]

Grotius found it necessary to get at some fixed principles, which should be acknowledged to be such by all who read them. In order to do this he was obliged to survey the diverse codes of morality and of general law. He penetrated into all the sciences between which and his own he could discover any analogy; and he examined the opinions of all great men, of whatsoever class, from

[1] Proleg. s. 30.
[2] Introduction to Dutch Jurisprudence, c. i. b. 1.
[3] Proleg. s. 39.
[4] De Jure Belli. Proleg. s. 40.

which he could extract any thing like a community of sentiment. The work of Grotius has therefore for its support all that the philosophers, the poets, the orators, the critics of antiquity or of modern times can furnish. It is aided by all the lights which can be drawn from the famous Civil Law, cleared from the defects and false glosses which had been put upon it by corrupt or ignorant interpreters; above all, it is finally connected and stamped with authority by large quotations from the Bible and the Fathers of the Church.[1]

Grotius does not agree with the saying of the old satirist—

"Nec natura potest justo secernere iniquum."

For man is an animal indeed, but one exceeding all the rest. Among the faculties peculiar to man is the desire of society; that is, not of every kind of society, but of one that is peaceable and well ordered, according to the capacity of his nature with others of his species. This the Stoics called οἰκείωσις.[2]

This preservation of society—*societatis custodia*—being thus agreeable to human understanding, is the very fountain of that law which is properly so called, to which belongs the abstaining from that which is another's, the obligation of fulfilling promises, the reparation of a damage done by our own default.[3]

From this signification of law arises another of larger extent. For by reason that man above all other creatures is endued, not only with this social faculty, but likewise with judgment to discern things pleasant or hurtful, and these not only present but future, and such as may prove to be so in their natural consequences; it must therefore be agreeable to human nature, that according to the measure of human understanding it should in these things follow the dictates of a well-tempered judgment, and not be corrupted either by fear or any allurements of present pleasure, nor be carried away violently by inconsiderate rashness. And whatsoever is contrary to

[1] Ward's Law of Nations, vol. ii. [2] Proleg. s. 6. [3] Ib. s. 8.

such a judgment is likewise understood to be contrary to the law of nature, that is, of human nature.[1]

In the age of Grotius the province of Jurisprudence had not yet been confined only to that class of external actions which is capable of being enforced by the public authority. Accordingly we find the erroneous classification of distributive (or attributive) and expletive justice, perfect and imperfect rights. And to this law of nature, he says, pertains also a wise dispensation in distributing to every person or society those things which are properly due to them, so as to prefer sometimes one of greater before one of less wisdom, a neighbour before a stranger, a poor man before one that is rich, and that according to each man's actions, and as the nature of the case requires, which many of old make a part of law properly and strictly so called; when, notwithstanding law, properly speaking, has a quite different nature, consisting in this—the permitting or causing another to enjoy what at present belongs to him.[2]

What is said by Carneades is not true—"Utilitas justi prope mater et æqui," for human nature itself is the mother of natural law, which, even though we were in want of nothing would compel us to desire mutual society.[3] Nor is this universally true—"Jussa inventa metu injusti fateare necesse est," which one in Plato explains thus:—"The fear of receiving injury occasioned the invention of laws, and force obliged men to the cultivation of justice; for this laws were made for the better execution of justice.[4] That saying is applicable only to those constitutions and laws which Bentham terms adjective in contradistinction to those substantive laws, whose execution they have in view; that is to say, it applies only to the laws of Procedure. As when a number of men, finding themselves weak when taken singly and apart, do, for fear of being oppressed by those that are stronger, combine together to establish, and with their joint forces to defend courts of justice, so that

[1] Proleg. s. 9.
[2] Ib. s. 10.
[3] Ib. s. 16.
[4] Ib s. 19.

together they may prevail over those for whom singly they were not a match.[1]

In the first book, after premising some things concerning the origin of law, Grotius examines the general question, whether any war is just. Then, after discussing the difference between a public and private war, he explains the authority of the supreme power itself, what people may have it, what kings, who in full, who in part, who with a power of alienating it, and who may have it in any other manner.[2]

The second book, undertaking to explain all the causes from whence a war may arise, states at large what things are common, what proper, what right one person may have over another, what obligation arises from dominion, what is the rule of regal succession, what right arises from covenant or contract, what is the force and interpretation of leagues, what of an oath both public and private, what may be due for damage done, what is the sacred privilege of ambassadors, what the right of burying the dead, what the nature of punishments.[3]

The third book treats first of what is lawful in war, and then, having distinguished that which is done with impunity, or which is even defended as lawful among foreign nations, from that which is really blameless, descends to the several kinds of peace and all agreements made in war.[4]

Since the treatise is entitled De Jure Belli, he first inquires whether any war be just, and then what may be just in that war. For right here signifies merely what is just, and that rather in a negative than in a positive sense. As right is that which is not unjust. Now that is unjust which is repugnant to the nature of a society of persons enjoying reason. "Nam jus hic nihil aliud quam quod justum est significat, idque negante magis sensu quam aiente, ut jus quod injustum non est. Est autem injustum quod naturæ societatis ratione utentium repugnat." So Cicero says, it is unnatural to take from

[1] Proleg. s. 19.
[2] Ib. s. 33.
[3] Ib. s. 34.
[4] Ib. s. 35.

another to enrich oneself, which he proves thus, because if that were allowed to all, human society and intercourse must necessarily be dissolved.[1]

There is another signification of the word right—*jus*—which relates to the person. In which sense right is a moral quality in a person enabling him to possess or do something justly. This right pertains to the person, though it sometimes relates to the thing itself; for example, servitudes of land. But this moral quality when perfect is called by Grotius faculty—*facultas*, when imperfect, aptitude—*aptitudo*.[2]

Civilians call a faculty that right which a man has to his own. But Grotius terms such a right, a right properly so called; under which phrase is contained a power over ourselves, which is termed liberty,—a power over others, such as the paternal—dominion over property, whether complete or incomplete, as usufruct, pledge, or the right of creditors to whom a debt is due.[3]

Aristotle calls aptitude by the term ἄξια. Expletive justice regards faculty [facultas], or the right we have to our own. This is termed by Aristotle συναλλακτική, commutative, a word too narrow and confined. For, that the possessor of my property should restore it to me is not ἐκ συναλλάγματος, and yet pertains to this species of justice. Attributive justice, called by Aristotle διανεμητίκη—distributive,—respects aptitude or worth, and is the companion of those virtues that are beneficial to others, as liberality, mercy, and directing prudence.[4]

Natural Law is the dictate of right reason, showing the moral turpitude or moral necessity which exists in any act, according to its agreement or disagreement with a rational and social nature; and consequently, that such an act is either forbidden or commanded by God, the Author of Nature:—"Jus naturale est dictatum rectæ rationis, indicans alicui actui ex ejus convenientiâ aut disconvenientiâ cum ipsâ naturâ rationali ac sociali inesse moralem turpitudinem aut necessitatem moralem,

[1] Lib. i. c. i. s. 3.
[2] Lib. i. c. i. s. 4.
[3] Lib. i. c. i. s. 5.
[4] Ib. ss. 7, 8.

ac consequenter ab auctore naturæ Deo talem actum aut vetari aut præcipi."[1]

As a definition embracing the whole sphere of right and duty, this is philosophically correct; but at the same time in it we see confounded Ethics and Jurisprudence. And as Jurisprudence only embraces those duties capable of being enforced, we must hold the definition of Grotius in this respect far too extensive.

Now, that any thing is or is not right by the Law of Nature, is generally proved by argument drawn either from what goes before or from what follows. The proof by the former is if the necessary agreement or disagreement of any thing with a reasonable and social nature be shown. The proof by the latter is when that is inferred to be a part of natural law, if not with the greatest certainty, at least very probably, which is believed to be such amongst all nations, or at least the most civilized. Yet a universal effect requires a universal cause. Thus Hesiod—

Φήμη δ' οὔτις πάμπαν ἀπόλλυται, ἥντινα πόλλοι
Λαοὶ φημίζουσι;

And Cicero: "In re consensio omnium gentium jus naturæ putanda est."[2]

The argument mentioned by Grotius as drawn from the consent of mankind, although by far the most important, is yet to be taken with certain qualifications. Men pass from barbarism through different stages of civilized life; and in such gradation hold different views as to their rights and duties. The science of Jurisprudence will probably be one of the last to arrive at perfection over the world. But we observe, even in the most advanced of the physical sciences—that of astronomy—that until very recent times most erroneous views prevailed amongst the most advanced nations. The opinions which a nation holds and practises in politics and laws may generally be taken as the most correct and advanced which are possible for them in their then state of progress. And such opinions give

[1] Lib. i. c. i. s. 10. [2] Grotius, Lib. i. c. i. s. 12.

us some assistance in ascertaining the fundamental principles of Law, but certainly do not afford equal assistance in our prevision as to the ultimate development of Jurisprudence.

Voluntary Law [Positive Law] is either human or divine. This Grotius divides into *jus civile* and *jus gentium;* whilst he erroneously separates from the *jus civile* the authority of a father over a child, or a master over a servant. A State is a perfect society of free men, united for the sake of the enjoyment of their rights and the common good. "Est autem civitas cœtus perfectus liberorum hominum, juris fruendi et communis utilitatis causâ sociatus." The Law of Nations derives its authority from the unanimous approbation of all, or at least many nations. Its proofs are the same with those of the unwritten civil law—continued use, and the testimony of men skilled in the laws.[1]

Grotius then proceeds, with very diffuse proofs, to show that to make war in certain cases is not contrary to the Law of Nature. This argument he illustrates from Reason, Sacred History, and the Consent of Mankind. Concerning force in self-defence, Cicero[2] gives the testimony of Nature herself:—"Est hæc non scripta sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa eripuimus, hausimus, expressimus, ad quam non docti, sed facti, non instituti, sed imbuti sumus: ut si vita nostra in aliquas insidias, si in vim, in tela aut latronum aut inimicorum incidisset, omnis honesta ratio esset expediendæ salutis."[3] The similar proofs and quotations in this chapter are most voluminous; but except for those who uphold the Quaker theory of non-resistance, its perusal is unnecessary.

The first and most necessary division of war is into private and public—a public war, made by him who has authority—a private war, otherwise. Private war is not wholly unlawful, even since the constitution of public courts of justice. Though it is much more conducive to the peace of mankind that differences should

[1] Lib. i. c. i. s. 14. [2] Pro Milone. [3] Lib. i. c. ii s. 3.

be examined by persons unconcerned, rather than by particular men, who, biassed by self-interest, do only that which they themselves think right.[1] Still he is reported innocent by the laws of all known nations who, by arms, defends himself against him that assaults his life.

Of public war, part is solemn by the law of nations, and part less solemn. Two things are requisite to make a war solemn by the law of nations—first, that it be made by the authority of those that have the sovereign power in the State, and then that certain formalities be used.[2]

What constitutes sovereignty is then discussed. The moral power of governing a State, which is wont to be termed the civil power, Thucydides describes by three things, when he calls a state that is truly a state, *αὐτόνομον, αὐτόδικον, αὐτοτελῆ*—self-legislating, self-judging, self-taxing.[3] After enumerating and reporting some other definitions, Grotius defines that power to be supreme whose acts are not subject to another's power, so that they cannot be made void by any other human authority:—"Summa autem illa dicitur, cujus actus alterius juri non subsunt, ita ut alterius voluntatis humanæ arbitrio irriti possint redditi."[4]

Grotius devotes the greater part of the remainder of this chapter to the repetition of the opinion that the supreme power is always in the people, and that they may restrain and punish princes for their mismanagement. It was, perhaps, impossible even for his mind to emancipate itself from the whole current of authority running in favour of the irresponsibility of princes. When Grotius wrote, Charles I. reigned in England, and Louis XIII. in France. Since that time the great revolutions in England and France have enlightened the mind of Europe on the natural right of the subject's resistance to oppression. Nor does the long array of authorities paraded by Grotius in favour of non-resist-

[1] Lib. i. c. ii. s. i [2] Ib. s. 4.
[3] Translated by Grotius, "suis utentem legibus, judiciis, magistratibus."
[4] Lib. i. c. iii. s. 7.

ance avail against the common sense of society. The conclusions of political science are that power is intrusted to the governors for the benefit of the governed; that taxes are wages paid to the public servants in exchange for security.

In the fourth chapter of this book, Grotius still further considers the main question, whether it be lawful for subjects to make war against their sovereign. He says it is allowed by all good men that if the prince commands any thing contrary to the Law of Nature or the commands of God, he is not to be obeyed; but at the same time maintains with abundant argument and illustration that resistance to the sovereign power is unlawful by the law of nature, the Hebrew law, and the Gospel.[1] Though the supreme magistrate may, sometimes through fear, anger, or some other passion, deviate from the ordinary path of justice and equity, this happening but seldom should be passed over. A more difficult question is, whether the law of non-resistance obliges us in the most extreme and inevitable danger? This seems, he says, to depend upon the intention of those who first entered into civil society, from whom the right is derived to the persons governing. But if they had been asked whether they would have imposed such a condition on all mankind as death itself, rather than in any case by force to repel the insults of their superiors, it is doubtful whether they would say they did design it, unless with this caution, that such resistance could not be made without great disturbance in the State, or the destruction of many innocent persons. Barclay[2] allowed that the people, or the nobler part of them, had a right to defend themselves against tyranny.

This argument, however, refers almost entirely to absolute sovereigns. For he proceeds to show that these princes who are under the people,—whether they at first received such a power, or it was afterwards made so by agreement, as in Sparta,—if they offend against the laws or the people may not only be re-

[1] Lib. i. c. iv. s. 1–5. [2] The opponent of the Jesuits and Buchanan.

resisted by force, but if it be necessary, may be punished by death, as it befel Pausanias the Spartan king. Next, if a king has abdicated his government, as he who manifestly forsakes it, we may do the same to him as to any private man; but he that is negligent in his government, cannot be said to forsake it.[1]

Grotius admits, that if the king directly like an enemy design the utter destruction of the whole body of his people, he loses his kingdom. For the design of governing and the design of destroying are inconsistent together.[2] He then considers the case of an usurper: not after he has either by long possession or agreement obtained a right to the government, but so long as the cause of his unjust possession continues. Against such an usurper it is lawful to rebel; but in a controverted right, no private person ought to determine, but to obey the present possessor.[3]

There is no other just cause of war than an injury received.[4] He first treats of injury to property. Here Grotius apparently leaves the main plan of his work and enters into a long disquisition upon the rights of property. A thing becomes our own either by the common right of men or by our individual right. And first, he treats of that which we have in common with all mankind. This right relates directly either to some corporeal things or to some individual actions. Corporeal things, in which there is no property are either incapable or capable of being appropriated; which that it may be the better understood, the origin of property called by the lawyers dominion, must be examined.[5]

An Utopian sketch is first given of the manners of the primitive age. And Tacitus is quoted in his description of the ancients living without evil desires, wickedness, disgrace, or punishment. "Vetustissimi mortalium nulla adhuc mala libidine, sine probro, scelere, eoque sine pœnâ aut coercitionibus agebant." And they contented

[1] Lib. i. c. iv. s. 9. [2] Ib. s. 11. [3] Ib. s. 20.
[4] Lib. ii. c. i. s. 4. [5] Lib. ii. c. ii. s. 1.

themselves with what the untilled earth did naturally afford them.[1]

Men, however, did not long continue in this pure and innocent state of being, but applied themselves to various arts. Even after this, not only cattle, but even lands were yet in common amongst neighbours, for the number of people was yet so inconsiderable in comparison to the vast tracts of land, that every one might convert what he would to his own use without any detriment and inconvenience to the rest.

> "Ne signare quidem aut partiri limite campum
> Fas erat."[2]

Hence we learn upon what account men first departed from the common use of not only movable but immovable things. For making choice of a life in which there was a necessity of using some industry, this industry was applied to the individual purpose of each. And things ceased to be in common as well by the mutual distance of men's habitations, as through a defect of justice there was no equality observed either in the labour or consumption of the fruits of the earth.[3]

At the same time we perceive what was the origin of property,—not by the individual act of the mind, for some could not know what others would desire, so as to abstain from it, and many might wish for the same thing; but by some expressed agreement as by division, or tacitly, as by occupation.[4]

The question is discussed whether men may not have a right to enjoy in common those things that have already become the property of other persons. In a case of absolute necessity that former right of using things as if they still remained in common must revive and be in full force. For in all laws of human institution, and consequently in that of property also, allowances are made for matters of strict necessity. Hence at sea, if there is a scarcity of provisions, what any man has reserved in store is distributed amongst the rest. And in case of fire one's neighbour's house may be pulled

[1] Lib. ii. c. ii. s. 2. [2] Virg. Geor. 1. [3] Lib. ii. c. ii. s. 2–4. [4] Ib. s. 2–5.

down if there be no other means of preserving one's own. As Seneca says:—"Necessitas, magnum humanæ imbecillitatis patrocinium omnem legem frangit."[1] The first right, therefore, which remains, since the introduction of property, from the ancient community of goods, is that of necessity. The second is that of innocent profit. As Cicero says:—Quidni enim, quando sine detrimento suo potest, alteri communicet in iis quæ sunt accipienti utilia, danti non molesta." The principle is this, that where a man can do any thing to his own advantage without detriment to another person, he may then act as if all things had still remained in common.[2]

Grotius carries this doctrine so far as to maintain that neutral nations ought to afford a free passage even to an army seeking to recover its rights in a just war. But this doctrine, if ever received, has long been exploded; and even in the case of private property it is better to give the possessor the uncontrolled disposal of it, trusting to the general good sense of mankind that such property will ultimately be managed in the best way for the good of the community.[3]

The principle of Free Trade is advanced. No tax which is laid on the subject to defray the public charges should be imposed on strangers who are only passengers through the country. If, however, the government should be put to expense for the security of merchandise, such taxes may be imposed as shall be no more than equivalent to the expense. And on this principle does the justice of all taxes and tributes entirely depend.[4]

Next to the right to things is to be discussed the common right to actions. And here is laid down that we have a right to such actions as the occasions of human life require.

To the methods of acquiring property by original division or by occupancy, the jurisconsult Paulus added that of labour, or as it is expressed, "Si quid ipsi ut in rerum naturâ esset fecimus." On this Grotius remarks,

[1] Lib. ii. c. ii. s. 6. [2] Ib. ss. 11–13. [3] Ib. ss. 47. 99. [4] Ib. s. 14.

since nothing can be naturally produced, except from some matter that did itself exist before, therefore if that matter be ours, then do we continue our property in what is produced from it. If it belong to no one then is our property in it acquired by the right of a first possessor; but if it belong to some other person it can never become our natural and absolute property.[1]

Occupancy is twofold, being divided into sovereignty and property, as Seneca explains—"Ad Reges potestas omnium pertinet, ad singulos proprietas."

Sovereignty may be exercised over the adjoining seas, but with certain limitations. Thus such a property can give no right of obstructing an inoffensive passage.[2]

The right of usucaption, or prescription, is next considered. A man is presumed to relinquish his right to a thing by an overt act when he has quitted it or thrown it away, unless it appears by some circumstances that he did so with some design of resuming it. So even a forbearance of action, if attended with particular circumstances, may morally be comprehended under the name of action. But before we can safely presume from a man's silence that he has relinquished his right, two circumstances are necessary to be observed; that he should know that he has such a right, and that he should voluntarily decline it; for he who forbears to act through ignorance should not in justice suffer from it. Length of time then, joined with non-possession, and with silence, evidences to the conjecture that the right to the thing is quitted. It may be observed that the period of prescription is very long in the infancy of civilization, and is diminished by countries according to their progress.

A right over persons is acquired by generation, by their consent, and by their crime. In the age of children three periods are to be distinguished. In that of infancy, or imperfect judgment, they are capable of inheriting an estate, though the exercise of that right be suspended. As Plutarch says, they have a right in pos-

[1] Lib. ii. c. iii. ss. 1, 2. [2] Ib.

session, but not in enjoyment, ἐν κτήσει, οὐκ ἐν χρήσει. In the second stage, when age has ripened their judgment, they are subject to parents only in actions which concern the family. In the third, that of emancipation, they are completely independent.[1]

Consent is the next mode discussed of acquiring authority. And the first species of it is marriage. The chief questions relating to divorce, polygamy, clandestine marriages, and incest are discussed.[2]

The right or authority of all other associations founded on consent is in the majority. It is to be presumed that those who enter into a society are willing that there should be some method fixed of despatching business. But it is altogether unreasonable that a greater number should be governed by a less; and, therefore, though no law expressed the precise form of managing affairs, the majority would naturally have the right and authority of the whole.[3]

The right is maintained of every citizen to leave his country, contrary to the practice of the Russians, which still continues in the nineteenth century. Nor shall the state retain any power over exiles. Voluntary subjection is either public or private; voluntary private subjection may be as various as there are various sorts of governments. Adoption in the Roman sense is the best kind; and slavery the worst. The succession from a person intestate is nothing else than a tacit will grounded on a conjecture of the intention of the deceased.

He next treats of such properties as are commonly called acquisitions by the Law of Nations. The Roman lawyers, when they treat of the acquiring of the property of things, reckon many modes which they say are according to the Law of Nations. But these are either to be referred to the Law of Nature which was the immediate consequence of an established property, and before all civil laws.[4] Grotius appears to forget here that the Romans used the term *jus gentium* to mean Natural Law. In the remainder of this chapter are discussed the questions

[1] Lib. ii. c. v. s. 1–6. [2] Ib. ss. 7–16. [3] Ib. s. 17. [4] Ib. c. vii. s. 1.

as to property in animals *feræ naturæ*, treasure trove, islands rising in rivers, &c. The order and almost the very words in the Institutes of Justinian are exactly followed.

The first title to property is occupancy. In the progress of civilization all the material constituents of wealth are appropriated, and title to property by labour becomes of primary importance. The title by occupancy is recognised and exemplified by Grotius. After the manner that wild beasts become our own, so do also other things that are without an owner—ἀδέσποτα. For nature gives all these to him who finds and takes possession first.[1]

Several of the legal propositions discussed in the Institutes of Justinian are analyzed, and many are disputed. Thus, if any one had formed a thing out of materials belonging to another, the Roman school of lawyers termed Sabinians gave the property to him whose the materials were, but the school of Proculeans to him who formed or put it into such a shape, because the latter gave it an existence which it had not before. At last a middle opinion was adopted, that if the matter could be put into its first form or shape, it should then be his who owned it before; if that could not be done, then it should be his who gave it its last form. But Connan was of opinion that we should consider whether the work or the stuff was worth most, so that the thing which was of the greater value might carry it from the other of less importance; and this argument was fetched from what the Roman lawyers have said concerning an accession.[2]

But Grotius is of opinion that if we consider the natural truth, as by a mixture of several materials there arises a common title to the thing so mixed in proportion to what each has contributed—which also the Roman lawyers approved of, because the right to such a mixture could not otherwise be fairly decided; so when a thing is composed of a matter and a form, as of its parts, if the matter belongs to one, and the form to another, then must it naturally follow that it belongs to each contributor, in

[1] Grotius, "De Jure Belli et Pacis," b. ii. c. viii. s. 6. [2] B. ii. c. viii. ss. 8–19.

proportion to the value of each part; for the form or shape is a part of the substance, but not the whole substance; which Ulpian saw when he said that the substance was almost lost by the alteration of its form.[1]

This may serve as a specimen of the discussion of similar questions.

The origin of the doctrine of Fixtures, springing from the maxim "Quidquid plantatur solo, solo cedit," is stated and justified by Grotius. That things planted or sown should go along with the soil is also a maxim of the Civil Law, for this reason, because they are nourished by it. And therefore there is a distinction about a tree whether it had taken root or not, for the nourishment of a thing that was growing before gives a title to part of it only; because, as there is some right due to the owner of the soil, on account of that nourishment, so there certainly still remains a natural right to the owner of the seed, plant, or tree. Thus in this case, too, Nature admits of partnership, as likewise in a building, of which the ground and the surface are only parts; for if it were movable, the owner of the ground could have no right, of which opinion was the jurisconsult Scævola.[2]

Nor, says Grotius, does Nature allow him, who has got another man's goods in his possession, though it were honestly and without fraud, to appropriate the profits of them to himself, but only empowers him to charge the cost at which he has been, and the pains which he has bestowed upon them, and to deduct for these out of the profits so arising.[3] The right of the improver is, however, recognised to retain a lien on the profits, if satisfaction be not made him some other way.

The cessation of jurisdiction and property is next discussed. These may cease by being abandoned, for where there is no will there is no property. There is another mode of the extinction of these rights when the subject in which the jurisdiction or property is ceases to be, as in the case of successions to an intestate. And therefore

[1] Grotius, "De Jure Belli et Pacis," b. ii. c. viii. ss. 8–19.
[2] Ib. s. 22. [3] Ib. s. 23.

if a person die without any signification of his will, and leaves no relatives behind him, all the right that he has dies with him too. His slaves become free; his subjects their own masters, because they are not in their nature things that may be possessed, unless they voluntarily part with their liberty, but all other things belong to the first occupant.[1]

The tenth chapter of the second book discusses the obligations which arise from property. Many of the intricate questions relating to the *bonâ fide* possession of another person's property are propounded. The very design of property is that every man might enjoy his own. "It is contrary to nature," says Cicero, "to augment one's own gain by another's loss,"—"Contra naturam esse, ex hominis incommodo suum augere commodum."[2] And again he says, "Nature does not endure that we should raise our wealth and fortune upon the spoils of others,"—"Illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus." Hence Grotius lays down, that he who has come by a thing honestly is not obliged to make any restitution if the thing be gone, because he neither enjoys the substance, nor any benefit by it; secondly, that whoever has come honestly by a thing is obliged, however, to restore all the produce of it which he has still remaining. He is not, however, to be obliged to restore the produce of his own labour and industry; for though without the thing there had been never any such produce, yet it does not in any way belong to the thing itself. The reason of this obligation arises from property, for he who is the owner of the thing is naturally the owner of the produce; thirdly, whoever has honestly got what is another's is obliged to give satisfaction, not only for the thing itself, but also for the produce of it, though that produce be spent and gone, if it appear that he must otherwise have spent and consumed as much of his own, because he is looked upon to be so much the richer for it.[3]

[1] Grotius, "De Jure Belli et Pacis," b. ii. c. ix. s. 2. [2] De Officiis, iii. c. v.
[3] Grotius, "De Jure Belli et Pacis," b. ii. c. x. s. 3–5.

Grotius also lays down that another's property, although honestly paid for, and the intermediate profits, are to be restored, nor can the *bonâ fide* possessor demand a reimbursement of his charges.[1] This doctrine is in accordance with the rule of the English Common Law, which denies the possessor by a bad title, though *bonâ fide*, any indemnification for the money which he may have laid out. This is wholly opposed to the rule of the Civil Law and the dictates of natural justice.

In the chapter on Promises the opinion of Francis Connan is first combated, who maintains that those promises which are not made upon mutual agreement are not binding either by the law of nature or nations. He acknowledges, however, that they may be justly performed, if the thing promised be such as might, had no promise ever been made, honestly be done. To confirm his opinion Connan adduces these reasons: first, that he who believes a man who promises rashly, and without any cause, is as much to blame as he who himself makes such a vain promise; secondly, that it would be very dangerous to most men's fortunes if they were obliged to perform all their promises, which they generally make more out of ostentation than a real intent to perform them; and lastly, that it is reasonable to leave some things to every man's honesty, and not to confine him to a necessity of performance. Cicero held that those promises were not to be performed, which are of no advantage to those who receive them, or the performance of which is more prejudicial to the promiser than of service to the promisee.[2]

Grotius distinguishes three degrees or manners of speaking about things future, which either really are, or at least ought to be, in our own power. The first is a bare assertion, signifying what we intend hereafter, in our present disposition. And that this may not be defective, it is required that we sincerely express what at that present time we think, but not that we continue in that thought. The second manner is when the will determines itself for

[1] Grotius, "De Jure Belli et Pacis," b. ii. c. x. s. 9. [2] B. ii. c. xi.

the time to come, by giving some positive token that sufficiently declares the necessity of performance. And this may be called a free promise, which setting aside the Civil Law, obliges either absolutely or conditionally; but yet gives no peculiar right to him to whom it is made. A third degree is, when to this determination of our will we add some outward sign declaring our consent and readiness to transfer our own right to somebody else. And this is a complete promise, as having the same effect as the alienation of a man's property. For it is either the means of alienating a thing, or at least the alienation of some part of our liberty. To the former belong our promises to give, to the latter our promises to do something. These things being premised, Grotius answers the arguments of Connan. For what the lawyers say of a naked promise, has reference only to what was introduced by the Roman laws, which made a stipulation —as in the English law a covenant or contract under seal—an undoubted sign of a deliberate mind.[1]

In the chapter on Contracts, Grotius discusses the rules and distinctions of the Roman Law more than in any other part of his work.

In all contracts Nature demands an equality; insomuch that the aggrieved person has an action against the other for overreaching him. This equality consists partly in the acts and circumstances, and partly in the nature itself of the contract. And this equality must be observed as well in those circumstances which are previous to the bargain, as those that are principal and essential to it. Thus the vendor ought to discover to us all the faults he knows of in the thing we are dealing for. Thus St. Ambrose has said, that in all contracts whatever faults are in the things exposed to sale, they ought to be discovered to the buyer, which if the seller does not, though the right of the thing be transferred to the buyer, the contract ought to be void by reason of the fraud. But this does not apply to those

[1] Ib. s. 4.

faults which are known to the dealer. Thus Horace has said,

> "Ille ferat pretium pœnæ securus, opinor:
> Prudens emisti vitiosum."

Mr. Hallam has acutely observed, that Grotius in this chapter treats the subject of contract as a part of ethics rather than of jurisprudence; and it is only by the frequent parallelism of the two sciences that the contrary could be suspected. Thus he maintains that equality being the principle of the contract of sale, either party is forced to restore the difference arising from a misapprehension of the other even without his own fault.[1] Not that he ever contemplated what Adam Smith meant by natural jurisprudence,—a theory of the principles which ought to run through and be the foundation of the laws of all nations. But he knew that the judge in the tribunal, and the inward judge in the breast, even where their necessity of determination appears essentially the same, must have different boundaries to their jurisdiction; and that as the general maxims and inflexible forms of external law, in attempting to accommodate themselves to the subtilties of casuistry, would become uncertain and arbitrary, so the finer emotions of the conscience would lose all their moral efficacy by restraining the duties of justice to that which can be enforced by law.[2]

The twelfth chapter is on Oaths. In every nation and in every age an oath has always been of the greatest weight and consideration in promises and contracts. For as Sophocles says in the Hippodamia,

> "An oath with sacred awe restrains the soul,
> And keeps it back from the double mischief
> Of disobliging friends and angering heaven."

This chapter is illustrated with extraordinary erudition. But the truths which it announces are now so generally recognised that it is unnecessary to dwell on them. The question of Dispensation is discussed. The act of our superiors cannot make void an oath, which is truly

[1] B. ii. c. xii. s. 12. [2] Hallam's Lit. of Europe, vol. ii. p. 556.

obligatory, so that it should not be fulfilled; for that belongs both to natural and divine right. But because all our actions are not fully in our own power, having some dependence on our superiors, therefore superiors are allowed a double power concerning what is sworn, the one directly over the person swearing, the other over the person to whom he swears. The act of the superior, says Grotius, may restrain the person swearing, either before he swears by making such an oath void, as far as the right of an inferior is subject to the power of a superior, or after he has sworn, by forbidding the performance of it. For an inferior as such could not bind himself without the consent of his superior, beyond which he had no power. And upon this foundation we limit the dispensations which princes in former times did exercise by themselves, which power they now voluntarily remit, that it may the more religiously be exercised by the ecclesiastical jurisdiction.[1] All this is on the principle not that a moral obligation can be released, but that the obligation itself is incurred under a tacit condition of the consent of superiors.

All that Grotius has thus laid down in reference to the natural obligations of mankind is but ancillary to the main subject of his work, the duties of the Sovereign power. And the promises, contracts, and oaths of those who have the sovereign power are now discussed. The opinion of those is refuted who hold that restitutions to the full, which arise from the Civil Law, extend to the acts of Kings as such; as also that Kings are not obliged by their oaths. During the period of European history when Grotius wrote, these questions were of importance, as the personal action of the Sovereigns entered so largely into politics. It appears idle now to consider how far a king is bound by his oath;[2] how far he is obliged to what he has promised without any cause or reason;[3] or whether the contracts of kings be laws. One question, however, of importance for all time is

[1] Grotius: De Jure Belli et Pacis, b. ii. c. xiii. s. 20.
[2] B. ii. c. xiv. s. 3. [3] Ib. s. 4.

treated on sound principles,—how far those who succeed to the Crown are obliged by the contracts of their predecessor. He states, those who succeed to the Crown by a new election are not directly, that is ἀμέσως, immediately obliged; but such successors are obliged ἐμμέσως, mediately. Every society, as well as every particular person, has a power to oblige itself, either by itself, or by its major part. This right they may transfer, either expressly or by necessary consequence, by transferring, for instance, the empire. For in morals he who gives the end, gives all things that conduce to the end. But this is not without its bounds and limitations, nor, indeed, is the infinite power of obliging absolutely necessary to the good government of a nation, any more than it is to the advantage of a trust. "A guardian," says Julian, "is in the stead of, and ought to be respected as, the master of a family, as long as he manages affairs discreetly, but not when he robs his ward."[1] If, by any accident, a contract made by a king appear to be not only disadvantageous, but also pernicious to the State, so that at the time when the contract was so made it had been adjudged unlawful and unjust, then may that contract be not so much revoked, as declared no longer obliging.[2]

After this long digression upon private contracts, Grotius returns to International Law. The next chapter is entitled "De Fœderibus ac Sponsionibus." The question is discussed whether leagues may be lawfully made with those who are enemies of the true religion. This, says Grotius, is not to be doubted in respect of the Law of Nature only. For that law is so kind to all, that it will not allow any difference on the account of religion. The question is whether, by the law of God, it be lawful or not. Such leagues were not universally forbidden by the ancient Hebrew Law. Although the later Jews refused intercourse with strangers. As Juvenal said of them:—

"Non monstrare vias eadem nisi sacra colenti."

"Ask 'em the road, and they shall point you wrong,
Because you do not to their tribe belong."[3]

[1] B. ii. c. xiv. s. 12. [2] Ib. [3] Dryden.

But by the example of God, who makes his sun to arise on the just and unjust, and sends his rain on the wicked as well as the righteous, we are taught to exclude no man from the benefit of our kindness. The law of brotherly love is extended to all mankind. Wherefore in such cases there is no intrinsic evil.[1]

Another question in the casuistry of nations is, how far the persons engaging are obliged, in case the prince or state should disapprove of the engagement: whether they are obliged to make every thing good, or whether they are obliged to put affairs in the same posture they were in before the engagement, or whether their bodies are to be delivered up.

The celebrated case of the Caudine Forks is discussed. Grotius determines the controversy in favour of the decision of the Roman Senate. Posthumius well said, —"You have promised the enemy nothing—you have commanded no citizen to engage for you—you have no binding contract with us, therefore, to whom you gave no order, nor with the Samnites, with whom you made no agreement: I deny that any binding contract can be made to bind the people, without the people's command:" "Hosti nihil spopondistis: civem neminem pro vobis spondere jussistis: nil ergo vobis nec nobiscum est, quibus nihil mandâstis; nec cum Samnitibus, cum quibus nihil egistis. Injussu populi nego quicquid sanciri posse, quod populum teneat."[2]

Promises consist in intention, not merely in words. As Cicero says: "When you promise we must consider what you thought not what you said"—"In fide quid senseris non quid dixeris cogitandum."[3] But because inward motives are not in themselves discernible, and there would be no obligation at all by promises, if every man were left to his liberty to put what construction he pleased on them, therefore some certain rule must be agreed on, whereby we may know what our promises oblige us to. If no conjecture oblige us otherwise, words

[1] Grotius: De Jure Belli et Pacis, b. ii. c. xv. ss. 1–11. [2] Liv. ix. 9.
[3] De Off. i. c. xiii.

are to be construed according to their proper sense—not the grammatical sense, but that which is in common use. Terms of art are to be explained according to their respective arts. Where words are ambiguous or contradictory, or where expressions will bear different senses, we must employ conjecture. The principal heads from whence these conjectures arise are the matter, the effect, and the circumstances or connexion.[1] The difference of acts due in equity and those due in strictness of law does not belong to the Law of Nations. The quibbling constructions upon the equivocal language of treaties—common in the middle ages, but now almost unknown—are censured by Grotius.

The common rule of construction is laid down, that things favourable or conferring a benefit, are to be construed largely; things odious, or onerous to the party, to be construed strictly.[2] The English Law has adopted this rule.

Of the three sources of rights and obligations—*pactio*, *maleficium*, *lex*—the first, contract, has now been discussed. Grotius designates by the term injury, *maleficium*, every fault, whether of commission or omission, contrary to what a man ought to do either in respect of his common nature, or his particular station. From such a fault an obligation naturally arises, that if an injury is caused it must be repaired.[3]

The right correlative to this obligation is to be distinguished from fitness or merit. From mere aptitude or fitness arises no true property, and consequently no obligation to make restitution; because a man cannot call that his own which he is only capable for, or fit for. Aristotle has observed that he does not transgress the rules of justice, who out of parsimony refuses to relieve a poor man with his riches. This Grotius cites with approval. It may now be remarked, that in the development of society the right of the poor to subsistence, founded upon their obedience to the law, has been recognised as a proper right to be enforced by the posi-

[1] B. ii. c. xvi. ss. 1–10. [2] Ib. s. 12. [3] B. ii. c. xvii. s. 1.

tive law. Whoever now refuses to contribute his just proportion to the support of the poor, transgresses the rules of justice, and is compelled by the State, at expense and inconvenience to himself, to discharge this just obligation.

The obligation to compensate for damage is discussed principally with reference to the affairs of private individuals. Sovereigns are bound to make reparation, if they do not use such means as they ought to prevent robberies and piracy.[1] The latest case in which this principle has been enforced was in the bombardment of Algiers by Lord Exmouth.

Grotius has hitherto treated of those rights that belong to us by the Law of Nature, adding some few that arise from the voluntary Law of Nations, as it is an addition to the Law of Nature. He now considers the obligations arising from the voluntary Law of Nations: of this the chief head discusses the Rights of Ambassadors.

There is a twofold right attributed to ambassadors; first, to be admitted, and then to have no violence offered to them. The Law of Nations requires that no ambassadors be rejected without cause. There are three causes why admittance may be denied—the potentate sending, the person sent, or the subject of the embassy. Grotius determines that it is the right of ambassadors to enjoy absolute impunity from the laws of the countries in which they reside, even in the case of personal crimes, or in the case of conspiracy against the government. This point he decides upon the universal practice of civilized states.[2]

The right of sepulture is discussed with a wanton profusion of splendid quotations from the classics. However, as a portion of the positive law of civilized nations, this may now be regarded as obsolete. The last disgrace apprehended by the pagan heroes is now never purposely inflicted. Great generals bury their defeated rivals with military honours. But when Grotius wrote, the barbarous custom of exposing the

[1] B. ii. c. xvii. s. 20. [2] B. ii. c. xix.

heads of the defeated as trophies, still prevailed. And the sentiment of the pious Æneas was shared by many leaders of civilization.

"Istic nunc, metuende, jace! Non te optima mater
Condet humi, patrioque onerabit membra sepulcro:
Alitibus linquêre feris; aut gurgite mersum
Unda feret, piscesque impasti vulnera lambent."[1]

"Lie there inglorious and without a tomb,
Far from thy mother and thy native home;
Exposed to savage beasts and birds of prey,
Or thrown for food to monsters of the sea."[2]

Injuries are to be considered in a twofold aspect, either as they may be repaired or punished. Punishment is defined as the evil of suffering on account of the evil of doing—"malum passionis, quod infligitur ob malum actionis." Amongst the things which Nature tells to be just and lawful, this is one, that he that doth evil shall suffer evil. Punishment does not belong to distributive justice; the fact that greater offenders are more severely punished, and lesser offenders more lightly, happens only by consequence and is not primarily intended. For what is simply and in the first place intended, is an equality between the offence and the punishment. And to punish does not naturally belong to any one person, but the right of punishment may be lawfully acquired by any person who is not guilty of the crime.[3]

As to the end of punishment, the opinion of Seneca is cited with approbation,—"No wise man punishes because there hath been crime, but that crime may not be committed:" "Nemo prudens punit quia peccatum est, sed ne peccetur." Punishment is not to be required amongst men, but for the sake of some benefit that may accrue. And though revenge is a natural sentiment with the ignorant and weak-minded, and may, indeed, be considered as the original motive force of punishment, yet it is unworthy of the philosopher. The benefit of punishment is threefold,—reformation, example, and the restitution of the evil done, in order to make satis-

[1] Virg. Æn. c. x. l. 557. [2] Dryden's Translation.
[3] Grotius, De Jure Belli et Pacis, b. ii. c. xx. s. 1–4.

faction to the sufferer. Grotius decides, that capital punishment ought very rarely to be made use of, though it may be said of incorrigible sinners that it is better for them,—that is, it is less evil for them,—to die than to live, when it is certain that they would grow still worse if their life was prolonged. Thus Galen, after he had said that men may be punished with death, first to prevent the mischief they would do were they suffered to live; secondly, that their punishment may be a terror to others, adds in the third place, that it is even expedient for themselves to die being so wholly corrupted in mind and manners, that it is impossible to reclaim them.[1]

The benefit that arises from punishment to him against whom the offence was committed consists in this, that it prevents for the future the like offence against him either by the same person or by others. And there are three ways of securing a person from the criminal who injured him; first, by putting him to death; secondly, by putting it out of his power to do him any further injury; and lastly, by the severity of the punishment, to deter him from offending any more. To prevent the injured person's being injured by others, all kinds of punishment are not to be inflicted, but only such as are open and public, which belong to the end of punishment, example.[2]

But the natural liberty of every man to vindicate his wrongs could not exist in society. Hence judges were appointed, and to them alone the power of determining punishment was given.

> "Acrius ex ira quod enim se quisque parabat
> Ulcisci, quod nunc concessum est legibus æquis,
> Hanc ob rem est homines pertæsum vi colere ævum."[3]

The province of justice in reference to punishment is determined. The internal acts of the mind, though they may be afterwards made known to others by confession or any other accident, ought not to be punished, because it is not agreeable to human nature that any right or obligation should arise amongst men from acts

[1] Grotius, De Jure Belli et Pacis, b. ii. c. xx. s. 7. [2] B. ii. c. xx. s. 8.
[3] Lucretius, v. 1147.

merely internal. Next, those acts that are unavoidable by human nature are not to be punished by human laws. As Plutarch says, following Solon : laws ought to be made in respect of what is attainable, if we would punish a few to some purpose, not the many to none. Lastly, those transgressions are not to be punished, which neither directly nor individually concern human society, or any other person. Because no reason can be assigned why the punishment of such sins ought not to be left to God.[1]

Hence it appears that in punishment there are two things to be regarded,—the reason why, and the end for which. The reason why, is the demerit,—the end for which, is the advantage of punishment. No one is to be punished beyond his desert. In weighing the magnitude of the crime, we must examine the motive that induced, the reason that ought to have restrained, and the fitness or capacity of the person for either one or the other. There is scarcely any man wicked for no purpose ; and if there be any one who loves wickedness for its own sake, he proceeds beyond the bounds of human nature.[2]

He briefly considers the right of punishing offences against the general law of nations. States have a right to exact punishment not only for injuries committed against themselves or their subjects, but likewise for those which do not peculiarly concern them; but which are in any persons whatsoever grievous violations of the Law of Nature and Nations. For the liberty of consulting the benefit of human society by punishments resides in those possessed of the supreme power. In undertaking such wars, however, several precautions are to be observed, lest we come within the censure of Plutarch on the Greeks,—they disguise their ambition and covetousness under a pretence of rendering barbarous nations more polite in their manners. Wars are not to be undertaken for mere violations of the positive divine

[1] Grotius, De Jure Belli et Pacis, b. ii. c. xx. ss. 18–20.
[2] B. ii. c. xx. s. 29.

law; nor can war be justly made upon those who refuse to embrace the Christian religion; nor against those who are mistaken in their interpretation of the divine law.[1]

The transmission of punishments is discussed in the next chapter,—De Pœnarum Communicatione. Those who command a wicked action, who when required give their consent to it, who afford their assistance, who countenance it when done, or are in any other respect accessory to it, either in advising, commanding, or encouraging the fact; they who prohibit it not when under a strict obligation of so doing, or who do not aid the sufferer when invested with a proper power and authority thereunto; they who dissuade not, when in duty they stand bound to do it; and they who then disclose not the matter when by virtue of some law they are so obliged; all these are laid down by Grotius as liable to punishment.[2] In some of these distinctions, however, he obviously transgresses the bounds of positive law, and lays down rules of moral duty.

States are answerable for the crimes of their subjects when unpunished; so guilt is contracted by protection from punishment. As laid down before, every particular person, if himself not chargeable with any such crime, has the privilege of inflicting punishment; but since the establishment of States it is reasonable to transfer such jurisdiction to them. But the prerogative of punishing offences against human societies does not so exclusively belong to particular States but that sometimes other States have a right to punish them. But since it is not convenient, nor the practice, for one State to admit within its territories another foreign Power upon the score of exacting punishment, it is reasonable that the State where the convicted offender lives or has taken shelter, should, upon application, either punish him, or deliver him up to the State of the injured party.[3]

The celebrated rights of suppliants and asylums—

[1] B. ii. c. xv. sub fin. [2] B. ii. c. xxi. s. i. [3] B. ii. c. xxi. s. 3.

supplicum jura et asylorum,[1]—do not stand in the way of this conclusion. This topic is illustrated by Grotius with brilliant prodigality of classical quotation. These ancient privileges, however, were only for those unjustly persecuted at home. Grotius states that in most parts of Europe, during the time he wrote, and the century before, this right of demanding fugitive delinquents to punishment had not been insisted on, unless their crimes affected the State, or were of a very heinous nature.[2] The practice of the advanced nations with respect to the mutual surrender of criminals escaping from justice is now different. England and the United States are now and have ever been political asylums. This country in particular has owed much of her greatness to such hospitality. There is no reason, however, that mere private criminals should not be brought to justice all over the world.

Having traced the methods by which a participation of the crime draws after it a participation of the punishment, he next shows how a man may be obnoxious to punishment though free from guilt. A distinction should be made between an intended and a direct damage, and what is only consequentially such. That is a direct damage, when any thing is taken from a man in which he had a certain property. That is a consequential damage, when one is intercepted from a future benefit, by the removal of the condition which alone could entitle him to it. Thus, the suffering to children from the confiscation of their father's property is not a punishment inflicted on them, because the property would not have been theirs unless possessed by the parent at the time of his death.[3]

Hence, according to the principle of Grotius, the English law of forfeiture in high treason is just, being part of the direct punishment of the guilty. Mr. Hallam considers confiscation no more unjust towards the posterity of the offender than fine, from which it differs only in degree; and that the law has as much right to

1 Κοινοὶ ἱκεσιας νόμοι.—Polybius. 2 B. ii. c. xxi. s. 5. 3 B. ii. c. xxi. s. 10.

exclude that posterity from enjoying property at all as from enjoying that which descends from a third party through the blood of a criminal ancestor, or in other words, that attainder is also a just punishment. However, it is to be considered that the absolute forfeiture of the property of the criminal is a punishment upon him, and the law need not consider that the consequences fall upon the innocent. The punishment of attainder falls solely upon the descendants innocent of the offence.

By the law of England prior to the statutes of the present century, the blood of the tenant who committed any felony was corrupted and stained, and the original donation of the feud was thereby determined, it being always granted to the vassal on the implied condition,—*dum bene se gesserit.* And not only was the person attainted incapable himself of inheriting or transmitting his own property by heirship, but he also obstructed the descent of lands or tenements to his posterity in all cases where they were obliged to derive their title through him from any remoter ancestor. The channel which conveyed the hereditary blood from his ancestors to him was not only exhausted for the present, but totally dammed up and rendered impervious for the future. These principles, so cruel to the descendants, have now been eradicated from the Law. By 54 Geo. III., c. 145, it is provided, that no attainder for felony, except for treason or murder, shall extend to the disinheriting of any person, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender during his natural life only. By 3 and 4 Wm. IV., c. 106, it is enacted, that when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted. By 4 and 5 Wm. IV., c. 23, no property held on trust or in

mortgage is to escheat or be forfeited by reason of the attainder or conviction of the trustee or mortgagee. This last enactment is a striking satire upon the legal technicalities which rendered it necessary.

A war without a just reason is robbery. No priority of discovery justifies war where there are existing possessors, even though they be wicked, without the idea of God, and of brutish intellects. For the right of discovery only refers to those things which are the property of none. For neither much virtue, nor perfection of the intellect, is necessary to dominion. This, however, may be maintained, that if there be people utterly devoid of reason then they do not possess dominion; but, out of charity, the necessaries of life ought to be supplied to them.[1]

Grotius decides against the right of taking up arms to recover liberty either by individuals or a community. There is no right in the Roman Emperor or in the Pope to govern the world. Even allowing that a universal monarchy were of advantage, the right of empire does not follow, as this arises only from consent, or where it is inflicted as a punishment,—"Concesso hoc expedire, jus imperii non sequitur ut quod nisi ex consensu aut pœna nasci nequit."[2] This chapter is concluded with a caution,—that the hopes which we conceive from the explanation of some divine prophecies can be no just cause for our declaring war. For besides that there can be no certain interpretation made of such prophecies as are not yet accomplished without the spirit of prophecy, the times of the accomplishment of these things must be unknown. Nor does the prediction at all—unless there be along with it an express command of God—give any right, since God often permits his predictions to be brought to pass by wicked men, or by wicked actions.[3]

War being a matter of the weightiest importance, and by which the innocent suffer many afflictions, is by all means to be avoided; and there are three ways by which national differences may be terminated without a

[1] B. ii. c. xxii. s. 10. [2] Ib. s. 13. [3] Ib. s. 15.

war,—by conference, arbitration, or by lot. For this last purpose even duelling is not altogether to be rejected, if two antagonists, whose disputes would otherwise involve a whole country in ruin, are willing to decide the matter by the sword. The question is determined whether war can be just and lawful on both sides with respect to the chief and principal authors of it. A thing may be termed just either from its cause or according to its effects. Again, in respect of the cause, a thing may be termed just, either according to the special acceptation of justice, or in the general sense, under which is comprehended all rectitude. Again, the special acceptation of justice is divided into that which pertains to the work and that which pertains to the agent, of which the one may be called positive, the other negative. In the particular acceptation of the word war cannot be just on both sides; nor can any lawsuit be so, because there is no moral faculty which, from the nature of the thing, can admit of contraries. But it may happen that neither of the parties in war acts unjustly. For no man acts unjustly but he who is conscious that what he does is unjust.[1]

Although it is foreign to a treatise on the right of war to demonstrate what other virtues enjoin in respect of it, still it is necessary to guard against a mistake, lest any should imagine that when his rights are certain it is either necessary or allowable forthwith to go to war. On the contrary, it is often better to abate somewhat of our right. However, this is not a matter of international law, but of moral prudence. Next are considered the causes for which war is to be undertaken on the account of others. A sovereign is not always obliged to take up arms, whatever just reasons any particular subject of his may have, unless all or most of his subjects would be sufferers on that account. And therefore Grotius strangely propounds, that "if one subject, although altogether innocent, be demanded by the enemy to be put to death, he may be abandoned, if it is mani-

[1] B. ii. c. xxiii. s. 13.

fest that the State is not able to withstand the enemy."[1] He states, that this point was in his day controverted amongst the learned, as it was in former times when Demosthenes invented the fable concerning the dogs, whom, as an article of peace, the wolves demanded the sheep to give up. Soto lays down, that such a subject is bound to deliver himself up to the enemy. This Vasquez denies, because it is not required by the nature of a civil society, which every one enters into for his own safety and advantage.[2]

It is a question whether one nation is obliged to defend another from injury. The opinion of Cicero is quoted, where he says, "He who does not prevent and oppose an injury, if possible, is as much in the wrong as if he would desert his parents, or country, or allies:" "Qui non defendit, nec obsistit, si potest, injuriæ, tam est in vitio, quam si parentes aut patriam, aut socios deserat."[3] The phrase, if possible, may be qualified according to the rule laid down by Sallust,—"All who, whilst their own affairs are prosperous, are invited to alliance in a war, ought to consider whether it is permitted them still to be at peace; next, whether the war to which they are solicited be pious, safe, and honourable, or disgraceful:" "Omnes qui secundis rebus suis ad belli societatem orantur considerare debent liceatne tum pacem agere; dein quod quæritur, satisne pium, tutum gloriosum, an indecorum sit."[4]

It is another question whether we have a just cause of war with another prince in order to relieve his subjects from their oppression. Interference is just in gross cases. As if a Busiris or Phalaris exercise tyranny over his subjects, the right of human society shall not be excluded. The chapter concludes with a protest against mere mercenary warfare.[5]

Subjects ought not to bear arms at the command of their sovereign if they be convinced that the cause is

[1] B. ii. c. xxv. s. 3. [2] Ib. [3] De Off. 1-7.
[4] In Historiis; apud Ammian. Marcel. lib. xxx. c. 9.
[5] Grotius, De Jure Belli et Pacis, b. ii. c. xxvi.

bad.[1] This principle, although a proof of the scrupulous morality of Grotius, is evidently impracticable and subversive of society.

Having considered not only who really make war, but for what reasons they are permitted to engage in it, in the third book is considered what are the actual rights in war. What is permitted in war arises from the law of nature, or the law of nations. In things of a moral nature, those which conduce to the end, from that very end derive an intrinsic worth. Wherefore, taking necessity not according to physical subtilty, but in a moral sense, we are understood to have a right to those things which are necessary to the end of attaining our right,—"jus." Right, he terms the faculty of acting consistently with the rules of a social nature,—"facultatem agendi in solo societatis respectu." Thus any violence may be used in the protection of life. In war many things are lawful, which in their essential nature are not so. War must needs cause suffering to many innocent persons, as when a ship full of pirates is sunk containing women and children. It is right to prevent neutrals also from supplying our enemy with munitions of war. Grotius refers this case to the Law of Nature, because he finds nothing on this point in history decreed by the voluntary Law of Nations.[2]

It is a question whether fraud be permitted in war. The authority of the classical writers, of the Roman lawyers, and of the Christian fathers is adduced in favour of the proposition. Fraud in its negative act is not of itself unlawful. Fraud in its positive act is distinguished either into such outward acts as admit of several constructions, or such as always signify the same by agreement. And fraud in the former sense is laid down by Grotius as lawful. But promises and oaths are always to be observed. And it is more agreeable to Christian simplicity to abstain from falsehood even to our enemies.[3]

The next chapter considers how by the Law of

[1] B. ii. c. xxvii. [2] B. iii. c. i. s. 5. [3] B. iii. c. i. s. 20.

Nations the goods of subjects are bound for the debts of their sovereigns; and the question of reprisals,—"quomodo jure gentium bona subditorum pro debito imperantium obligentur: ubi de repressaliis." Naturally no man is bound by the act of another, except the heir. But by the Law of Nations, the goods of the subjects are bound for the debts of the State. This right to indemnification is enforced by reprisals.[1]

A regular war by the Law of Nations must be between different States. A State is to be distinguished from a body of pirates. He is a regular enemy who has a government, a court, and some regard for peace and treaties.[2] A formal declaration of war is required to prevent treachery. Nor should war be made as soon as proclaimed; and convenient time should be granted for the making of retribution or punishing an offender.[3]

The effects of a solemn war are generally lawful and unpunishable. The right of slaughter and pillage is laid down as extending not only against those who are actually in arms, and the subjects of the prince engaged in war, but also all those who reside within his territories. Even the slaughter of women and children is allowed and comprehended within the rights of war. But as the Law of Nations in this respect tolerates many things which are forbidden by the Law of Nature, so it prohibits some things allowed by the Law of Nature. Thus, it is not allowed to kill an enemy by poison, to use poisoned weapons, or to poison wells.[4] These maxims are useful as illustrating the sentiments then prevailing amongst jurists on these points. It would not now be contended that it is lawful purposely to kill women and children in war.

The goods of an enemy may be destroyed or plundered, even those of a sacred or public nature.[5] By the Law of Nature those things may be acquired in a just war, which are either equivalent to what is due to us, or

[1] B. ii. c. ii. [2] Cicero, Philipp. iv, c. 6.
[3] "Grotius, De Jure Belli et Pacis," b. iii. c. iii. s. 13. [4] Ib. c. iv.
[5] Ib. c. v.

which within certain just limits, punish the aggressor. And by the consent of nations, things are said to be taken in war when they are so detained that the first owner has lost all probable hopes of recovering them. This is presumed in the case of movables, when they are within our garrisons; but in the case of land when it is secured within fortifications. It is a difficult question sometimes whether the spoils taken from an enemy belong to the captors or the State. There is a distinction between public and private acts in a war. The land is usually taken by some public act, as by bringing on it an army, or by planting garrisons. Things movable, if not taken in public service, belong to the private captor.[1]

Although by nature no man is slave to another, still, all prisoners in a regular war are by the Law of Nations slaves.[2] This great power over the persons, property, and posterity of the conquered is granted in order that the captors, being tempted by so many advantages, may be inclined to forbear the utmost rigour allowed them by the law, of killing their prisoners either in the flight, or in cold blood. This Law of Nations has not been universally received, although the Roman lawyers call it general; and amongst Christians it was in the time of Grotius generally understood, that prisoners in war were not made slaves so as to sell, or force them to such miseries as are common amongst slaves. And thus, though in but a small matter, has the Christian religion completed that which Socrates in vain attempted to have introduced amongst the Greeks.[3] As the individual may be reduced to slavery, so may the entire community, whether it be a State or part of a State, and whether that subjection be merely civil, merely tyrannical, or mixed.[4]

In the preceding disquisitions many things have been said to be of right or lawful,—"juris esse aut licere,"—because they escape punishment, and partly also because

[1] B. ii. c. vi. s. 12. [2] Ib. c. vii. [3] Ib. c. vii. s. 9. [4] Ib. c. viii.

military councils give them authority, which, however, either transgress the rule of right, or at least may be left undone with more regard to religion and with greater praise from good men.[1] All the acts done in an unjust war are positively unjust, and restitution must be made for them. Even though one has not himself done the wrong, but yet keeps in his possession a thing taken away by another in an unjust war, he is obliged to restore it; because there can be no reason produced naturally just why the other should be deprived of it.[2]

As Grotius has above stated what the positive Law of Nations and the practice of the most civilized armies allowed in war, he now proceeds to show, according to his own doctrine, what moderation should be employed in war. The principal authors of the war are to be distinguished from those who are drawn into it. And even where justice does not exact forgiveness, it often becomes goodness and an exalted soul to forgive. The Romans advanced their greatness by forgiving. Even against the wicked war ought not to be prosecuted to the utmost, but only so far, till they have made satisfaction for, and amended, their crimes.[3] Women, children, and old men are to be spared. In short, only against those that are in arms and resist are the last extremities to be employed, — "jure belli in armatos repugnantesque cædes."[4] Those too ought to be spared who surrender on fair terms, and even without conditions. The Law of Nature does not allow retaliation, unless against personal offenders. Hostages are to be spared unless they have committed some crime, or broken faith.[5]

That one may destroy the property of another without injustice, one of three things must be antecedent: either such a necessity as ought to be understood excepted in the first institution of property; as if any one in order to avoid danger should throw the sword of a madman into the river,—or some debt, or some injury, that may merit such a punishment, or which such a

[1] B. iii. c. x. s. 1. [2] Ib. s. 6. [3] Ib. c. xi. s. 8.
[4] Livy, l. xxviii. c. 23. [5] B. iii. c. xi. s. 18.

punishment does not proportionally exceed. But no unnecessary destruction ought to be employed, as against trees, houses, ornamental and public buildings. Temples ought to be respected ; and sepulchres cannot be violated without breach of common humanity.[1] There ought to be a certain moderation about things taken in war. In nature there is no right to more booty than is sufficient to indemnify us for our wrongs. The rules of charity reach further than the rules of justice. He that abounds in wealth is guilty of inhumanity, if he strip his poor debtor of all his property, to pay himself the last farthing, especially if the debtor contracted that by his kindness towards another, as if he had become surety for his friend, and had received none of the money to his own use. Wherefore humanity requires us to spare the goods of those who are in no fault concerning the war.[2]

Rules are laid down as to moderation concerning slaves where this right of war yet exists. He that wages just war has a right over the subjects of his enemy taken prisoners only so far as the satisfaction of the injury requires. There is a great difference between what may be done to a slave by the Law of Nations, and what by natural reason. Thus Seneca,—"though against a slave all things are allowable, there is something which the common Law of Nature forbids to be done against a man :"—"cum in servum omnia licent, est aliquid quod in hominem licere commune jus animantium vetet."[3]

As other things may be obtained in a just war, so may the right of sovereignty over a people, but this only so far as the greatness of the punishment due to their offences, the satisfaction of a debt, or our own safety may require. That the end of war is peace, is illustrated by many classical quotations. Thus Sallust, of the old Romans said,—"our ancestors took nothing from the vanquished except their power of injury :" "majores nostri, religiosissimi mortales, nihil victis eripiebant,

[1] B. iii. c. xii. [2] Ib. c. xiv. s. 4. [3] Sen. de Clem. c. xviii.

præter injuriæ licentiam;"[1]—a sentiment worthy of a Christian, and which he further illustrated when he said, "wise men make war for the sake of peace, and labour in the hope of rest:" "sapientes pacis causâ bellum gerunt, et laborem spe otii sustentant."[2]

It is wise and prudent to incorporate the vanquished with our own citizens, or even to leave them some part of the government. But even if all empire be taken from them, they ought to be left at least their ordinary laws, about their own private and public affairs, and their own customs and magistrates. Another privilege ought always to be allowed to them, the exercise of their own religion.[3]

Nothing ought to be taken in war from neutral states, except through necessity, and on making compensation. And it is the duty of neutrals absolutely to do nothing, to behave alike to both parties, as in suffering them to pass through their country, to supply them with provisions, and not relieve the besieged.[4]

When our faith is engaged, it must be kept even with enemies; for their being enemies does not make them cease to be men.[5] And all men endowed with the faculty of reason are capable of a right from a promise. From the society of reason and of language arises the obligation of a promise.

The obligation to speak truth arises from a cause more ancient than war; and although it may sometimes be removed by war, yet a promise of itself confers a new right. Grotius denies the doctrine maintained by the ancient Roman jurists, that faith is not to be kept with robbers and pirates. He again, on principles derived from the casuists, declares that he who is compelled by an unjust fear to make a promise, may be obliged to perform it, if he has confirmed it by an oath, for thereby he stands bound not only to man, but also to God, against whom fear can be no exception. Faith is to be kept

[1] Catil. Bel. c. xii. [2] De Repub. Frag. c. 6.
[3] "Grotius, De Jure Belli et Pacis," b. iii. c. xv. s. 11. [4] Ib. c. xvi.
[5] Ib. c. xviii.

even with rebellious subjects. Though the case is not without difficulty. Sometimes they may have a cause not in itself unjust, yet still, according to Grotius, they have no right to act by force against their prince. Sometimes their cause may be so unjust, or their resistance so obstinate, that it may be severely punished. But still, if they be treated with as deserters, or rebels, and a promise made to them, a punishment though justly due is not to be pleaded to prevent the performance of that promise. A greater difficulty may arise from the legislative power and the supreme right of dominion exercised by an absolute prince. Still it is expedient that such agreements should be performed, especially if confirmed by an oath. In a regular war, also, whatever promises are made are so valid, that though they were occasioned by a fear unjustly caused, yet they cannot be made void without the consent of those to whom the promise is made.[1]

There are two ways in which to avoid the error of falsehood, and not to perform the promise; namely, on default of the condition, or by making satisfaction otherwise. The origin of compensation is this, when we cannot otherwise recover what is our own, or what is justly due to us, we may receive from him who either keeps what is our's, or is indebted to us, the full value thereof in any thing else. Whence it follows that we may much the more keep what is actually in our own possession, whether corporeal or incorporeal. Whatever, therefore, we have promised we need not perform, if it be of no greater value than that belonging to us which the other party detains unjustly.[2]

All agreements between enemies depend upon faith either expressed or implied; and the obligation of treaties depends upon their having been concluded by the proper authorities of the state. In monarchical governments this rests with the sovereign, in aristocratical or democratical with the majority. Most kings in modern times —says Grotius—holding their dominions, not as their

[1] B. iii. c. xix. s. 13. [2] Ib. s. 15.

patrimonial inheritances, but as usufructuaries—regnum habentes non in patrimonio, sed tanquam in usufructu,[1] —have no power by any contract to alienate their dominions in whole or in part. That the whole empire may be firmly alienated, the consent of the whole body of the people is required, which may be effected through their representatives; and that any part of the empire may be firmly alienated, a twofold consent is required, both of the whole body, and especially of that part which is to be alienated. It is often disputed what right kings have to dispose of the goods of private persons to preserve a peace. It has been above laid down that the goods of subjects are under the supreme power of the state, so that the state or the sovereign may make use of them, and even destroy or alienate them, not only upon an extreme necessity, which allows to private persons a sort of right over other's property, but also for the public benefit. To this must be added that the entire state is obliged to repair the damage sustained by any subject on that account out of the public stock.[2]

In articles of peace favourable conditions are to be construed largely; unfavourable, strictly. Treaties of peace are generally based either upon the principle of placing the parties in their original position, or in each party retaining his acquisition at the conclusion;—ἔχοντες ἃ ἔχουσι. In doubtful cases the latter is to be allowed, because it is more easy. It is to be presumed in every peace that no action shall be commenced for damages done in war. Yet those debts due to private persons at the beginning of the war retain their full force.[3]

To decide a war by lot is not always lawful; but if one being unjustly assaulted shall upon due examination find himself too weak to make resistance, he may refer his case to chance, that by an uncertain he may escape a certain danger, which of the two evils is the least. The question of deciding a battle by single combat is considered. If we only respect the extreme right of nature, no doubt such combats are lawful; for that law

[1] B. iii. c. xx. s. 5. [2] Ib. s. 7. [3] Ib. s. 11–16.

gives one leave to destroy his enemy how he can; and if the opinion of the old Greeks and Romans was right, that every man had an absolute power over his own life, then these combats are reconcilable to internal justice. Still Grotius decides them to be repugnant to right reason and Christianity. And there is but one thing which can render such a combat lawful—that is upon one side only—when otherwise it is highly probable that he who prosecutes the unjust cause should be the conqueror.[1]

A truce is an agreement by which during the war we for a time forbear all acts of hostility. And on its expiration there is no occasion for a new declaration of war. During the truce all acts of hostility are unlawful, either against persons or things. But to retreat with an army, to repair a wall, or to levy soldiers, is not a breach of truce, unless it be particularly excepted in the agreement. And if the truce be broken on one side, the other may proceed to acts of hostility without any declaration. The redemption of prisoners is to be much favoured.[2]

Among public agreements are to be reckoned what the general of each army have agreed amongst themselves. But this is to be understood only of those generals to whose conduct the entire war is intrusted. There are some other methods also whereby a sovereign power may be obliged by the previous acts of its officers, yet not so that the fact is the proper cause of the obligation, but only the occasion of it; and this in two ways, either by consent or by the reason of the thing itself. Consent appears by the ratification, expressed or implied. By reason of the thing itself, they are obliged, so as not to be enriched by another's loss—that is so, as either to perform the contracts, from which they receive an advantage, or abandon such advantage.—"Qui sentit commodum sentire debet et onus."[3]

Private persons, as well as governments, are bound by their agreements with the enemy. Farther, not only with those who are enemies by the law of nations, but even with thieves and pirates faith ought to be kept.

[1] B. iii. c. xx. s. 43. [2] Ib. c. xxi. [3] Ib. c. xxii.

But in the latter case there is this difference, that if an unjust fear extort a promise from us, we are not bound towards pirates as we are in regular warfare.[1] Faith may be tacitly given; as, for example, he who puts himself under the protection of another state agrees to do nothing against it. Wherefore the act of Zopyrus who betrayed Babylon is not to be excused, for his loyalty to his king could not justify his treachery to those unto whom he had fled.[2] The last chapter of this laborious work again asserts that peace is the end of war, and the common interest of the civilized world is to preserve peace; and concludes with a prayer, that God, who alone has the power, may impress these maxims on the hearts of those under whose management are the affairs of Christendom, and endow their minds with a sense of Divine and Human Right.[3]

Grotius has been recently edited by Dr. Whewell. It is to be regretted that more care has not been bestowed upon the edition than has probably lain within the leisure of the Master of Trinity College. International Law first cultivated by Grotius, and called by him to a place amongst the great modern sciences of Europe, might have been illustrated by its history and literature down to the present generation, in an edition published at the expense of the University of Cambridge, and edited by its ablest moral and political philosopher.

This has not been done by Dr. Whewell. The main feature in his edition of Grotius is the English translation of the text at the bottom of each page. The translation does not embrace the numerous quotations with which every page of this great work is adorned. "By this means," says Dr. Whewell, "the bulk of the work has been reduced to one-half; while the names of the authors quoted, being retained in the translation, the reader can, if he chooses, pass to the passages adduced, which he will find in the same page. The translation is thus rather a selected than an abridged translation; for the didactive and argumentative parts are in general so far from

[1] B. iii. c. xxiii. [2] Ib. c. xxiv. [3] Ib. c. xxv. finis.

being abridged, that explanatory expressions and clauses are introduced in a great number of passages where they seemed likely to make the meaning clearer."

The publication of the great work of Grotius formed an era in the history of Moral Philosophy and of Political Economy, as well as of Jurisprudence. A new impulse was given to the study of ethical science,—a new direction to the thoughts of the learned. Although Grotius did not professedly define Jurisprudence, or the first principles of the science as cultivated by Mackintosh and Bentham; although he did not define the limits of the Law, nor separate the study of the Law, by a marked and definite boundary, from the great domain of Ethics; still the progress which he made in the cultivation of that part of the Social Science which treats of Positive Law and its result upon society, places him at the head of modern jurists.

It is a curious study to compare the extraordinary blaze of popularity which the writings of Grotius enjoyed for a century after his death, with the almost total neglect of modern times, varied, in many instances, by positive censure.

A considerable period has now elapsed since there has been any general review of the object of the Treatise on the rights of War and Peace, and the reception it has met from succeeding jurists and philosophers. It would be interesting briefly to consider the opinions so expressed, and to compare the progress of International Law, as manifested in the conduct of England and France during the Russian war, with the barbarism sanctioned during war by the most civilized nations when Grotius wrote. In the former part of such an inquiry, we would be obliged to go over much of the ground already occupied by Dugald Stewart, Sir James Mackintosh, and Mr. Hallam. Paley and Dugald Stewart both attacked the author of the "Rights of War and Peace." Paley says, "The writings of Grotius and Puffendorff are of too forensic a cast; too much mixed up with Civil Law and with the Jurisprudence of Germany, to answer pre-

cisely the design of a system of ethics, the direction of private consciences in the general conduct of human life." He censures the extraordinary use of quotations from the classic poets. "To any thing more than ornament they can make no claim. To propose them as serious arguments, gravely to establish or fortify a moral duty by the testimony of a Greek or Roman poet, is to trifle with the reader; or, rather, take off his attention from all just principles in morals."

"Grotius," says Condillac, "was able to think for himself; but he constantly labours to support his conclusions by the authority of others. Upon many occasions, even in support of the most obvious and indisputable propositions, he introduces a long string of quotations from the Mosaic Law, from the Gospels, from the Fathers of the Church; and, not unfrequently, even in the very same paragraph, from Ovid and Aristophanes."

Objections of this class have been answered by Sir James Mackintosh, in his "Discourse on the Law of Nature and Nations." Grotius "was not of such a stupid and servile cast of mind, as to quote the opinions of poets or orators, of historians and philosophers, as those of judges from whose decision there was no appeal. He quotes them, as he tells us himself, as witnesses whose conspiring testimony, mightily strengthened and confirmed by their discordance on almost every other subject, is a conclusive proof of the unanimity of the whole human race on the great rules of duty and the fundamental principles of morals. On such matters, poets and orators are the most unexceptionable of all witnesses, for they address themselves to the general feelings and sympathies of mankind; they are neither warped by system nor perverted by sophistry; they can attain none of their objects, they can neither please nor persuade, if they dwell on moral sentiments not in unison with those of their readers. No system of moral philosophy can surely disregard the general feeling of human nature, and the according judgment of all ages and nations. But where are those feelings and that

judgment recorded and preserved? In those very writings which Grotius is gravely blamed for having quoted. The usages and laws of nations, the events of history, the opinions of philosophers, the sentiments of orators and poets, as well as the observation of common life, are in truth the materials out of which the science of morality is formed; and those who neglect them are justly chargeable with a vain attempt to philosophize without regard to fact and experience—the sole foundation of all true philosophy."

During the present century in England the unsparing censure laid by Dugald Stewart upon Grotius has done much to exclude from our universities and from general study the treatise "De Jure Belli." In his Dissertation, Stewart states expressly that he allots to Grotius and his successors a space considerably larger than may at first sight seem due to their merits. "Notwithstanding the just neglect into which they have lately fallen in our universities, it will be found, on a close examination, that they form an important link in the history of modern literature. It was from their school that most of our best writers on Ethics have proceeded, and many of our most original inquiries into the human mind; and it is to the same school that we are indebted for the modern science of Political Economy."

Stewart then proceeds to say that Grotius, under the title "De Jure Belli et Pacis," arrived at a complete system of Natural Law; and he quotes the opinion of Condillac that the title was chosen in order to excite more general curiosity. The inaccuracy of this remark must be obvious to any one who has perused the work. Independent of the express statement of Grotius himself, as to the inducement which caused him to undertake the labour, it is plain that his primary object was International Law. But in the sixteenth century it was impossible to lay down the principles of International Right, until the very ideas of Right itself, of Dominion, and of War were correctly eliminated from the confusion in which Grotius found them. "All ethical philosophy, even in

those parts which bear a near relation to Jurisprudence and International Law, was in the age of Grotius a chaos of incoherent and arbitrary notions, brought in from various sources; from the ancient schools, from the Scriptures, the fathers, the canons, the casuistical theologians, the rabbins, the jurists, as well as from the practice and sentiments of every civilized nation, past and present, the Jews, the Greeks, and Romans, the trading republics, the chivalrous kingdoms of modern Europe."

Stewart considers that the very different and indeterminate views which Grotius and his followers entertained upon the subject of Jurisprudence were the main reasons why, according to him, they made such slender additions to the stock of human knowledge. "Among the different ideas," says Stewart, "which have been formed of Natural Jurisprudence, one of the most common (particularly in the earlier systems) supposes its object to be to lay down those rules of justice which would be binding on men living in a social state without any positive institutions; or, as it is frequently called by writers on this subject, living together in a state of nature." And this idea of the province of Jurisprudence appears to have been uppermost in the mind of Grotius in various parts of his treatise.

4. Culverwell, 1612–1651.

An elegant and learned discourse of the Light of Nature, by Nathanael Culverwell, Master of Arts, and lately Fellow of Emanuel College, Cambridge. London: Rothwell, 1652; edited by Dr. Brown, Edinburgh: Constable, 1857.

Cotemporaneous with Grotius were Culverwell, Zouch, Selden, and Hobbes. Later in the seventeenth century four other English authors, Harrington, Sidney, Cumberland, and Locke, illustrated various branches of Civil and Political Right. The times were favourable to such researches. Although Europe had previously seen factions and civil wars, Europe had never before seen an entire nation rising against a legal authority—

a parliament legally making war against their king; and executing their king in due form of law.

Nathanael Culverwell entered Emanuel College, Cambridge, in 1633, took his degree of B.A. in 1636, and of M.A. in 1640. He was chosen a Fellow, and died in 1651. After his death his works were edited and published by Dr. William Dillingham. The discourse of the Light of Nature must have been popular, inasmuch as four editions were required during seventeen years. But since 1669 the volume was not reprinted until 1857. It appears to have sunk into utter obscurity, principally from the Calvinistic and Puritanical principles of the author; and is not noticed by Dugald Stewart, Mackintosh, Tennemann, or Hallam. Yet the merit of the work is great, considering the period when it was written. Dr. Dillingham informs us that the Light of Nature was finished in 1646. It is thus long prior to the works on Ethics which appeared in England during the latter part of the seventeenth century. Jeremy Taylor's Doctor Dubitantium was published in 1660; Cumberland's De Legibus, in 1672; and Cudworth's Intellectual System, in 1678. Culverwell's writings are amongst the latest of that class in which it was thought necessary to fortify every proposition with a number of quotations drawn from the most miscellaneous stores. His treatise on the Light of Nature was originally written in the form of a set of Academic sermons, on that text of Proverbs which declares the understanding of a man to be the candle of the Lord. This strained analogy was suited to the taste of the period when Culverwell wrote. The foundation of morality is placed by Culverwell in the Divine Nature. "This eternal law is not really distinguished from God himself. For *nil est ab eterno nisi ipse Deus.* So that it is much of the same nature with those decrees of his, and that Providence which was awake from everlasting. . . . . And thus the Law of Nature would have a double portion, as being the first-born of this eternal law, and the beginning of its strength. Now, as God himself shows somewhat of his face in the glass of

creatures, so the beauty of this law gives some representations of itself in those pure derivations of inferior laws that stream from it. And as we ascend to the First and Supreme Being by the steps of second causes, we may climb up to a sight of this eternal law, by those fruitful branches of secondary laws; when, indeed, it is in heaven. And that I may vary a little that of the Apostle to the Romans, 'The invisible *law* of God, long before the creation of the world, is now clearly seen, being understood by those laws which do appear, so that the knowledge of the law is manifested in them, God having shown it to them.' Thus, as the Schoolmen say, very well, every derivative law supposes a self-existent law."[1]

It will be seen by this quotation that Culverwell adhered to the ancient and scholastic theories of Law and Morals; to that school which Sir James Mackintosh has observed was broken up by the revolutionary efforts of Hobbes, and succeeded by that of Shaftesbury and Butler. He held the Jus Naturæ to be a sort of code of law self-existent and antecedent to all human law.

Culverwell also held the moral obligation to depend upon the Divine Will; and he censures Plato and others who dwell exclusively upon the harmony and inherent reason of laws.

The third chapter is on Nature. Though Nature be printed and engraved upon our essences, and not upon ours only, but upon the whole creation; and though we put all the letters and characters of it together, as well as we can, yet we shall find it hard enough to spell it out, and read what it is. The soul cannot so easily see its own face, nor so fully explain its own nature.

Nature speaks these two things: it points out the origin of existence, it is the very genius of entity; it is present at the nativity of every being; nay, it is being itself. It speaks the action of existence, and it is a principle of working in spirituals, as well as the source of motion and rest in corporeals. All essence bubbles out, flows forth, and paraphrases upon itself in opera-

[1] Light of Nature, cap. v.

tions. Hence such workings as are facilitated by custom are esteemed natural. Hence that known saying of Galen, "Habit is second nature." Thus the moralists express virtues or vices that are deeply rooted by this term, "becomes natural."

The fourth chapter is on the Nature of a Law. The definitions of Aquinas and Suarez are given. The utilitarian theory is supported. In the framing of every law there ought to be an aiming at the common good; and thus that speech of Carneades, "Utility may almost be called the mother of justice and equity" Utilitas justi prope mater et æqui,—if it be taken in this sense is very commendable. The judge should only follow the last and practical dictate of the law; his will, like a blind power, is to follow the last light of intellect of this reason that is to rule and guide him; and therefore Justice was painted blind, though the Law itself be possessed of eyes. For the mind sees, the mind hears, and the will itself is to follow the last decision of the head—the meaning of the law in all circumstances. There should be also the seal of the law; that is, the approving and passing of the law. After a sincere aim at public good, and a clear discovery of the best means to promote it, there comes then a fixed and sacred resolution, "we will and decree." This speaks the will of the lawgiver, and breathes life into the law; it adds vigour and efficacy to it. There should also be the voice of the trumpet; that is, "the promulgation and recommendation of the law." The law is for a public good, and is to be made known in a public manner; for as none can desire an unknown good, so none can obey an unknown law; and therefore invincible ignorance does excuse, for else men should be bound to absolute impossibilities.[1]

The fifth chapter is on the Eternal Law. The Schoolmen define it a kind of eternal, practical method of the whole distribution and government of the universe. It is an eternal ordinance, made in the depth of God's infinite wisdom and counsel, for regulating and govern-

[1] Light of Nature, c. iv. Brown's edition, pp. 40–49.

ing the whole world, which yet had not its binding virtue in respect of God himself, who has always the full and unrestrained liberty of his own essence, which is so infinite as that it cannot bind itself, and which needs no law, all goodness and perfection being so intrinsical and essential to it; but it was a binding determination in reference to the creature, which yet, in respect of all irrational beings, did only strongly incline, but in respect of rationals, does formally bind.

The Law of Nature is that law which is intrinsical and essential to a rational creature. A law is founded in intellectuals, in the reason, not in the sensitive principle. It supposes a noble and free creature; for where there is no liberty, there is no law—a law being nothing else but a rational restraint and limitation of absolute liberty. Now, all liberty is radically in the intellect; and such creatures as have no light, have no choice, no moral variety.

All punishment is for the sake of producing good; as Plato speaks, "not on account of the trangression; for what has been done can never be made undone." It is not in the power of punishment to recall what is past, but to prevent what is possible; and Seneca almost translates Plato word for word: "No wise man punishes because a crime has been committed, but that it may not be committed again; for past offences cannot be recalled, but future ones are thus prevented:"—"Nemo prudens punit quia peccatum est, sed ne peccetur; revocari enim præterita non possunt, futura prohibentur."[1] So that the end of all punishment is either for compensation, which is a restitution, by the offender, for the advantage of the punisher; it is for the advantage of the injured party, or else it is for improvement, and so for the advantage of the transgressor, or else it is for the sake of example, for the advantage of others.[2]

This Law of Nature, having a firm and unshaken foundation in the necessity and conveniency of its ma-

[1] Seneca, De Ira, 1–16.

[2] Light of Nature, cap. iv. Brown's edition, pp. 57–80.

terials, becomes formally valid and vigorous by the mind and command of the Supreme Lawgiver, so as that all the strength and nerve, and binding virtue of this law are rooted and fastened partly in the excellency and equity of the commands themselves, but they principally depend upon the sovereignty and authority of God himself; thus contriving and commanding the welfare of His creature, and advancing a rational nature to the just perfection of its being. This is the rise and original of all that obligation which is in the Law of Nature.

In order of nature this law, as all others, must be made before it can be known; entity being the just root and bottom of intelligibility. So that reason does not make or propose the law, but only discover it. All verity is but the gloss of entity.[1]

Though Nature's Law be principally proclaimed by the voice of reason, yet there is also a secondary and additional way which contributes no small light to the manifestation of it. This is the harmony and joint consent of nations, who, though there be no communion nor commerce, nor compact between them, yet do tacitly and spontaneously conspire in a dutiful observation of the most radical and fundamental laws of nature.[2]

The remaining chapters are taken up with illustrations of the Light of Reason. Their titles are:—The Light of Reason is a derivative light; The Light of Reason is a diminutive light; The Light of Reason discovers present not future things; The Light of Reason is a certain light; The Light of Reason is directive; The Light of Reason is calm and peaceable; The Light of Reason is a pleasant light; The Light of Reason is an ascendant light.

Culverwell appears in Political Philosophy as one of the latest of the Calvinistic school, represented in France by Hotmann and Languet, and in Scotland by Buchanan. A reaction against their doctrines took place in England on the restoration of Charles II. And after the Revolution of 1688, the English attempted to unite Royalty and Liberty.

[1] Cap. ix. pp. 98, 99. [2] Cap. x. p. 109.

5. John Selden, 1584–1654.

Seldeni De Jure Naturali et Gentium juxta Disciplinam Ebræorum, libb. vii. London: 1640, fol. Mare Clausum, 1635.

Selden lived under James I., Charles I., and Cromwell. He was a member of parliament, and one of the party in the House of Commons that impeached the Duke of Buckingham and the Earl of Strafford. He always maintained an unsullied reputation in the midst of the excesses of the times, and was considered amongst his countrymen the first jurist of England. He wrote books both of legal practice and scientific erudition. The merit of his work on Natural Law was great. At that time the Philosophy of Right was unknown. Neither Bodin or Bacon had attempted a philosophical explanation of the legal relations which govern human nature.

The Mare Clausum appeared in 1635. It was written in opposition to the Mare Liberum, the political tract of Grotius, and maintained that England's great policy was to hold the sovereignty of the seas.

In 1640, Selden published the treatise De Jure Naturali et Gentium, juxta Disciplinam Ebræorum. He adopted the idea that the patriarchal power was the greatest and earliest manifestation of political science known amongst mankind, and the foundation of all subsequent forms of social government :—"The patriarchal authority which existed in Adam, Seth, Noah, Melchisedek, and other chief princes of that period, was extended to the judges and prefects, for they united the ecclesiastical and political power. Thus the authority of Moses was twofold: in one respect, sacerdotal; in another, royal, and absolute in public domination. Thus, under the theory of a pontifical sovereign, or sacerdotal prince, he executed sacred and civil functions, as was the case with the patriarchal pontiffs who succeeded in the line of primogeniture. It is therefore acknowledged that Moses was priest and king, and such pontifical emperors were the judges or prefects that succeeded him."

However, Selden promulgated very advanced doctrines as to the kingly power. A king is a thing men make for their own sake. They grant him certain high privileges and powers; but it is upon condition that he should guard their liberties and administer their laws. The moment he neglects either, he has broken the condition, and his privileges are forfeited. He is reduced to the liabilities of a subject. It matters little in what form such a delinquent's crimes appear. He has disregarded the purpose for which he was raised to the throne; and no reason, either technical or moral, can convince the understanding that he has not degraded himself, or is not justly brought within the power of the law he has despised.

Selden's treatment of the Hebrew laws is analogous to the discussion of the Roman laws by the civilians. He draws from the Hebrew laws a type of Natural Law. Still he makes a philosophical distinction. In the system of the Hebrew laws he separates what is fundamental and universal from the purely political laws which relate to the constitution of the Hebrew Republic.

6. Richard Zouch, 1590–1661.

Works: Elementa Jurisprudentiæ, Definitionibus, Regulis, et Sententiis, Selectionibus Juris Civilis Illustrata: Oxford, 1629, 8vo. Juris et Judicii Fecialis, sive Juris inter Gentes, &c., explicatio: Oxford, 1650, 4to. Cases and Questions resolved at Civil Law: Oxford, 1652, 8vo. Solutio Quæstionis de Legati Delinquentis Judice Competente, 1657, 8vo. Quæstionum Juris Civilis Centuria in Decem Classes Distributa: Oxford, 1660, 8vo.

Dr. Richard Zouch was Professor of Law in the University of Oxford, and Judge of the High Court of Admiralty in England. He published, in 1650, a work entitled "Juris et Judicii Fecialis, sive Juris inter Gentes et Quæstionum de eodem explicatio." This may be considered as the first elementary treatise on International Law, combining the elements of both natural and positive law.

In his preface, Zouch announces, that whilst he has treated hitherto of rights generally, in different writings, and of the rights which exist between private individuals

in relation to each other, as well as between private individuals and princes or sovereigns, he now likewise intends to investigate those rights which are involved in the relations of princes or sovereigns—"Explicationem eorum quæ ad communionem quæ inter duenos principes aut populos intercedit conducunt."

In illustration of this general definition of the Law of Nations, he divides it into natural—that which is founded upon the tacit consent of nations, and into that which is founded upon the express consent of nations, as declared in their treaties and confederacies:—"When many men, at different times, affirm the same thing, this fact must be referred to an universal cause, which can be nothing else than a right conclusion, flowing from the principles of nature, or else some common consent; the former indicates the Law of Nature; the latter, the Law of Nations. Besides, in addition to common customs, whatever individual nations mutually agree upon with one another must be regarded as the law between the nations, since the common paction of the state constitutes law; and all nations united are bound by consent, no less than in their individual capacity:—"Cum multi diversis temporibus, idem affirmant, id ad causam universalem referri debeat, quæ alia esse non potest quam recta conclusio ex naturæ principiis proveniens, aut communis aliquis consensus e quibus illa jus naturæ indicat, hic jus gentium. Deinde præter mores communes, pro jure etiam inter gentes habendum est, in quod gentes singulæ cum singulis inter se consentiunt; utpote per pacta, conventiones, et fœdera; cum communis reipublica sponsio legem constituat; et populi universi, non minus quam singuli suo consensu obligentur."

Zouch was the first who sketched an outline of the Law of Nations in its whole extent, theoretical as well as practical. He also was the first to distinguish between *jus gentium* and *jus inter gentes*. Bentham invented the word *international;* but its Latin synonym had previously been first used by Zouch.

CHAPTER II.

1. Thomas Hobbes, 1588—1679.

Works: Elementa Philosophica De Cive: Paris, 1642, 4to. Leviathan: London, 1651, fol. Human Nature; or the Fundamental Elements of Politics: London, 1650, 12mo. De Corpore Politico; or the Elements of Law, Moral and Political: London, 1639, 12mo. Moral and Political Works: London, 1750, fol. Complete Works, English and Latin, edited by Sir W. Molesworth, 16 vols. 8vo.: London, 1839–1845.

Savigny has said that a domain of science like Law, cultivated by the unbroken exertions of many ages, is for the present time a rich inheritance. There is not merely the mass of truths accomplished, but the efforts of scientific minds, all the attempts of our predecessors, whether they have been fruitful or failures, are either guides or warnings; and thus we are enabled to labour with the united strength of the ages that are past. Were we, through indifference or presumption, to neglect this natural advantage of our position, and to abandon to chance the influence which it ought to exercise over us, then should we throw away an inestimable advantage,—the indissoluble substance of true science, the community of scientific convictions, and the living progress, without which that community would degenerate into a dead letter.[1] Thus, although there is more to censure in the writings of Hobbes than we shall find in those of any other philosopher who has written so much and so well, it is impossible to deny the importance of his place in the History of Jurisprudence. Even by the very opposition which his paradoxes excited progress was accelerated. Against Hobbes, Harrington defended liberty, and Clarendon the Protestant Church; against him Cudworth insisted upon the natural distinction between right and wrong; whilst Cumberland, Shaftesbury, Clarke, Butler, and Hutcheson, are all arrayed in philosophical antagonism against the author of the Leviathan; all are warned by his errors, and even in

[1] System des heutigen Römischen Rechts. Vorrede, i.

opposition benefit by his genius and industry. But though Hobbes be condemned for having in his political system represented man as an untameable beast of prey, and government the strong chain by which man is kept from mischief, his theories are not all error; succeeding writers have derived much assistance from his powers of analysis; whilst his idea that man is by nature solitary and selfish, that the social union is entirely an interested league, has been expanded into the doctrine of Utility; and though in some instances pushed too far, has been applied with success to the theory of Punishment by Bentham.

Thomas Hobbes,—one of the greatest intellects of the seventeenth century, and deservedly ranked with those eminent persons, Bacon, Des Cartes, and Grotius,—was born at Malmesbury, in Wiltshire, on the 5th of April, 1588. At school an indifferent classical scholar, in 1603 he proceeded to Magdalen Hall, Oxford; and, on the recommendation of the Principal of the College, was in 1608 taken into the family of Lord Hardwicke, afterwards Earl of Devonshire, as tutor to his eldest son. With him he made the grand tour; and in foreign society added the study of the Belles Lettres to the philosophy of Aristotle. On his return to England with the young Lord Cavendish, he speedily became known to persons of the highest talents and position. Bacon is said to have employed the rising philosopher in the translation of several of his works from English into Latin. And it may be presumed that this circumstance contributed not a little to encourage that bold spirit of inquiry and that aversion to scholastic learning which characterize his writings; whilst, through obstinacy and excessive opinionativeness, he determined to found a system of his own, disregarded experiment, and despised the labours of his predecessors. Lord Herbert of Cherbury was also one of the friends of Hobbes; and Ben Jonson is said to have revised his first published work —the translation of Thucydides. Of this translation Hobbes entertained the exalted idea which young

authors generally feel towards the first-born of their literary labours. He seems to have thought that its publication would have had some effect in preventing the civil war. It was undertaken, as he somewhat affectedly tells us, "with an honest view of preventing, if possible, those disturbances in which he was apprehensive his country would be involved, by showing, in the history of the Peloponnesian war, the fatal consequences of intestine troubles." Hobbes was one of those men who have been *seri studiorum*. By the age of thirty he had supplied the defects of his early education so as to be able to write Latin with fluency; but his first work, the Translation of Thucydides, was not published until he had arrived at the mature period of forty years. It was after this too, that he learned the first rudiments of geometry. However, the influence of his character and conversation was always great. In France, such was the reputation of Hobbes, that, although he had previously written nothing except the Translation of Thucydides, his observations on the Meditations of Des Cartes were published in the works of that philosopher along with those of Gassendi and Arnauld. It was not until towards his sixtieth year that he began to publish those philosophical writings which have excited such endless controversies amongst the learned, and have raised questions still undetermined. Hobbes passed a great portion of his life on the Continent, as tutor to the two successive Earls of Devonshire. In 1637, on his return to London, he found England agitated by the political convulsions which were preparing the fall of the Monarchy. His devotion to the family of Devonshire, as well as his natural inclination, made him embrace the cause of the Crown; and the warmth with which he supported it was converted into a violent indignation for democratic opinions, and even for all liberal doctrines. In 1640 he sought an asylum in France which might afford him the advantage of continuing his labours in peace, and publishing them in freedom. There, in 1642, he first printed his treatise

De Cive for private circulation. In 1647, he published the treatise at Amsterdam, with vindicatory notes; and a French translation was also published at Amsterdam in 1648. In 1650, an English treatise appeared with the Latin title, De Corpore Politico; and in 1651, the entire system of his philosophy was published in the Leviathan. Immediately after the appearance of the treatise De Cive, Des Cartes said of it:—"I am of opinion that the author of the book De Cive is the same person who wrote the third objection against my Meditations. I think him a much greater master of morality than of metaphysics or natural philosophy, though I can by no means approve of his principles or maxims, which are very bad and extremely dangerous, because they suppose all men wicked, or give them occasion to be so. His whole design is to write in favour of Monarchy, which might be done to more advantage upon maxims more virtuous and solid." But others, and of a different character, were not wanting in their censure of the Leviathan, and the alleged motives of its publication. Clarendon informs us that Hobbes told him in Paris, when the work was near publication, that he knew it would be displeasing to him. Whereupon, on Clarendon hearing some of the doctrines, and remonstrating with Hobbes, the latter replied, "after a discourse between jest and earnest, 'the truth is, I have a mind to go home.'" And Clarendon's expressed opinion of the Leviathan is this:—"The review and conclusion of the Leviathan is, in truth, a sly address to Cromwell, that being out of the kingdom, and so being neither conquered nor his subject, he might, by his return, submit to his government, and be bound to obey it. This review and conclusion he made short enough to hope that Cromwell might read it; when he should not only receive the power of his new subject's allegiance by declaring his own obligations and obedience, but by publishing such doctrines as being diligently infused by such a master in the art of government, might secure the people of the kingdom (over whom he had no right

to command) to acquiesce and submit to his brutal power." The theologians at once exclaimed against the Leviathan, that it contained many impieties, and that its author was no longer of the royal party. Hobbes was ordered to appear no more at the court which Charles II. maintained in exile. Many were of opinion with Clarendon, that Hobbes had modified many passages so as to ingratiate himself with the party which was triumphant in England. In effect he accomplished a return to England in 1653, and lived in comparative obscurity with his patron the Earl of Devonshire. He published another resumé of his philosophy in 1655, entitled Elementa Philosophiæ. These are divided into three parts, entitled De Corpore, De Homine, De Cive; the last being substantially the same with the treatise similarly named and published separately. Upon the restoration of Charles II., in 1660, he came up to London, where the king graciously received him, and settled £100 per annum on him out of the privy purse. In 1666 he received an alarm in the censure of his works De Cive and the Leviathan by both Houses of Parliament; but the storm blew over, and he lived peaceably for the remainder of his life in the family of Lord Devonshire. The Earl of Devonshire, as Dr. Kennet, in the Memoirs of the Cavendish Family, informs us, for his whole life entertained Mr. Hobbes in his family as his old tutor rather than as his friend or confidant. He let him live under his roof in ease and plenty, and in his own way, without making use of him in any public or so much as domestic affairs. He would often express an abhorrence of some of his principles in policy and religion; and would often say, "he was a humorist, and nobody could account for him." Hobbes' professed rule of health was to dedicate the morning to his exercise, and the afternoon to his studies. At twelve o'clock he had a little dinner provided for him, which he ate by himself without ceremony. Soon after dinner he retired to his study, and had his candle, with ten or twelve pipes of tobacco laid by him; then shutting his door he fell to smoking,

thinking, and writing for several hours. Towards the end of his life he had very few books, and those he read but little, thinking he was now able only to digest what he had formerly fed upon. If company came to visit him he would be free in discourse till he was pressed or contradicted, and then he had the infirmities of being short and peevish, and referring to his writings for better satisfaction. His friends who had the liberty of introducing strangers to him made these terms with them before their admission, that they should not dispute with the old man nor contradict him.

In 1674 and 1675 he published his translation of the Iliad and Odyssey, being then in his eighty-seventh year. The singularity of the undertaking, and the extraordinary versification, render these works objects of the greatest curiosity. The translation of the Iliad commences thus :—

"O Goddess, sing what woes the discontent
Of Thetis' son brought to the Greeks; what souls
Of heroes down to Erebus it sent,
Leaving their bodies unto dogs and fowls:
Whilst the two princes of the armies strove,
King Agamemnon and Achilles stout:
That so it should be was the will of Jove,
But who was he that made them first fall out."

Beattie, in his Essay on Poetry and Music, has severely criticised these translations. In his Iliad and Odyssey, Hobbes proves by his choice of words that of harmony, elegance, and energy of style he had no manner of conception. The work is in every respect unpleasing, being nothing more than a fictitious narrative, delivered in mean prose, with the additional meanness of harsh rhyme and untuneable measures. Pope also has characterized the poetry of Hobbes as too mean for criticism. However, these translations may fairly be looked on as never intended to meet the eye of the reviewer; they were only the amusement of the translator's old age. Hobbes died on the 4th of December, 1679, in his ninety-second year.

I only briefly allude to the position of Hobbes in the

history of philosophy, for his real eminence and influence lay in the domain of politics. In philosophy Hobbes is decidedly the precursor of modern Materialism; and all our knowledge is made by him to rest upon experience. I shall now proceed to a brief analysis of the Leviathan, and the parallel works by which it is illustrated, so far as they relate to Jurisprudence. Hobbes has hitherto been strangely neglected by historians of philosophy. Dugald Stewart, in the historical dissertation, bestows only three pages of careless criticism upon him. Sir James Mackintosh, although one of the first to perceive his importance, could afford no space for an analysis in his brilliant, yet somewhat sketchy, essay. Mr. Hallam has been the first carefully and laboriously to peruse the Leviathan and comment upon its doctrines: Sir William Molesworth's elegant edition has done much to popularize Hobbes and Philosophic Radicalism. But the benefit to society is at least doubtful.

The Leviathan commences with a description of the means whereby the body politic is constructed. Nature, the art whereby God hath made and governs the world, by the art of man as in many other things so in this also is imitated, that it can make an artificial animal. Art goes yet farther in imitating that rational and most excellent work of Nature—man. For by art is created that great leviathan called a Commonwealth, which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended, and in which the sovereignty is an artificial soul as giving life and motion to the whole body; the magistrates and other officers of judicature and executive, artificial joints; reward and punishment, by which, fastened to the seat of the sovereignty, every joint and member is moved to perform his duty, are the nerves that do the same in the body natural; the wealth and riches of all the particular members are the strength; *salus populi*, the people's safety, its business; counsellors, by whom all things needful for it to know are suggested unto it, are the memory; equity and laws, an artificial reason and will; concord,

health; sedition, sickness; and civil war, death; lastly, the pacts and covenants by which the parts of this body politic were at first made, set together, and united, resemble that fiat pronounced by God in the creation. To describe the nature of this artificial man, Hobbes proposes to consider, first, the matter thereof and the artificer; both which is man; secondly, how and by what covenants it is made; what are the rights and just power or authority of the sovereign, and what it is that preserves or dissolves it; thirdly, what is a Christian commonwealth; lastly, what is the kingdom of darkness.[1]

Hobbes, following Bacon, in regarding physics the mother of the sciences, considered it was necessary to know the animal and material nature of man before we could proceed to the study of his mind, or the discussion of the varied combinations of society. And before entering upon the political doctrines of the Leviathan it may not be inapposite to give a brief sketch of Hobbes' metaphysical system.

The thoughts of men, says Hobbes, are every one a representation or appearance of some quality or other accident of a body without us, which is commonly called an object, which object works on the eyes, ears, and other parts of a man's body; and by diversity of working produces diversity of appearances. The original of them all is that which we call sense, for there is no conception in a man's mind which hath not at first totally or by parts been begotten upon the organs of sense. The rest are derived from that original.[2]

That when a thing lies still, unless somewhat else stir it, it will lie still for ever, is a truth that no man doubts of. But when a thing is in motion it will eternally be in motion unless somewhat else stay it, though the reason be the same—namely, that nothing can change itself, is not so easily assented to. For men measure not only other men, but all other things by themselves; and because they find themselves subject, after motion, to pain and lassitude, think every thing else grows weary

[1] Leviathan, end of Preface. [2] Leviathan, cap. i.

of motion and seeks repose of its own accord; little considering whether it be not some other motion wherein that desire of rest they find in themselves consists.[1]

When a body is once in motion it moves, unless something else hinders it, eternally; and whatsoever hinders it, cannot in an instant, but in time, and by degrees, quite extinguish it; and as we see in the water, though the wind cease, the waves do not give over rolling for a long time; so also it happens in that motion which is made on the external parts of man when he sees dreams. For after the object is removed or the eye shut, we still retain an image of the thing seen, though more obscure then when we see it. And this it is the Latins call imagination, from the image made in seeing; and apply the same, though improperly, to the other senses. But the Greeks call it fancy, which signifies appearance, and is as proper to one sense as another. Imagination is, therefore, nothing but decaying sense; and is found in men and many other living creatures as well sleeping as waking.[2]

The longer the time is after the sight or sense of any object, the weaker is the imagination. For the continual change of man's body destroys in time the parts in which sense was moved, so that distance of time and of place has one and the same effect in us. For as at a great distance of place that which we look at appears dim and without distinction of the smaller parts; and as voices grow weak and inarticulate, so also after great distance of time our imagination of the past is weak; and we lose, for example, of cities we have seen many particular streets, and of actions many particular circumstances. This decaying sense, when we would express the thing itself, that is, fancy, is called Imagination; but when we would express the decay, and signify that the sense is fading, old, and past, it is called Memory. Much memory, or memory of many things, is called Experience.[3]

The third chapter of the Leviathan, of the consequence

[1] Leviathan, cap. ii. [2] Ibid. [3] Ibid.

or train of imagination, contains the elements of the theory of Association touched upon afterwards by Locke, and developed by Hartley. By consequence or train of thoughts Hobbes understands that succession of one thought to another which is called mental discourse. When a man thinks on any thing, whatsoever is next thought after is not altogether so casual as it seems to be. Not every thought to every thought succeeds indifferently. And this train of thoughts or mental discourse is of two sorts. The first is unguided, without design, and inconstant; wherein there is no passionate thought to govern and direct those that follow, to itself, as the end and scope of some desire or other passion, in which case the thoughts are said to wander, and seem impertinent one to another, as in a dream. The second is more constant, being regulated by some desire and design. For the impression made by such things as we desire or fear is strong and permanent, or if it cease for a time, of quick return; so strong it is sometimes, as to hinder and break our sleep. And the train of regulated thoughts is of two kinds; one, when of an effect imagined we seek the causes or means that produce it; and this is common to man and beast. The other is, when imagining any thing whatsoever we seek all the possible effects that can by it be produced; that is to say, we imagine what we can do with it when we have it.

The fourth chapter of the Leviathan, on Speech, has been considered the most valuable, as well as original, in the writings of Hobbes. The invention of printing though ingenious compared with the invention of letters, was no great matter. It is a profitable invention for continuing the memory of time past, and the conjunction of mankind dispersed into so many and distant regions of the earth. But the most noble and profitable inventions of all others was that of speech, consisting of names or appellations, and their connexion; whereby men register their thoughts, recall them when they are past, and also declare them one to another for mutual utility and conversation; without which there had been

amongst men neither commonwealth nor society, nor contact, nor peace, no more than among lions, bears, and wolves. The first author of speech was God himself, that instructed Adam how to name such creatures as he presented to his sight; for the Scripture goes no further in this matter. But this was sufficient to direct him to add more names, as experience and use of the creatures should give him occasion, and to join them in such manner, by degrees, as to make himself understood; and so, by succession of time, so much language might be gotten as he had found use of, though not so copious as an orator or philosopher requires.[1]

The general use of speech is to transfer our mental discourse into verbal, or the train of our thoughts into a train of words; and that for two commodities, whereof one is the registering of the consequences of our thoughts, which, being apt to slip out of our memory, and put us to a new labour, may again be recalled by such words as they were marked by; so that the first use of names is to serve for marks or notes of remembrance. Another is, when many use the same words to signify, by their connexion and order one to another, what they conceive or think of each other; and also what they desire, fear, or have any other passion for. And for this use they are called Signs. Special uses of speech are these: first, to register what, by cogitation, we find to be the cause of any thing present or past, and what we find things present or past may produce or effect, which, in some, is acquiring of arts; secondly, to show to others that knowledge which we have attained, which is to counsel and back one another; thirdly, to make known to others our wills and purposes, that we may have the mutual help of one another; fourthly, to please and delight ourselves and others, by playing with our words for pleasure or ornament innocently.[2]

Seeing then that the truth consists in the right ordering of names in our affirmations, a man that seeks precise truth has need to remember what every name he uses

[1] Leviathan, cap. iv. [2] Ibid.

stands for, and to place it accordingly, or else he will find himself entangled in words, as a bird in lime twigs, the more he struggles the more belimed; and, therefore, in geometry, which is the only science that it hath pleased God hitherto to bestow on mankind, men begin at settling the significations of their words, which settling of significations they call definitions, and place them in the beginning of their reckoning. By this it appears how necessary it is for every man that aspires to true knowledge, to examine the definitions of former authors; and either to correct them where they are negligently set down, or to make them himself. For the errors of definitions multiply themselves according as the reckoning proceeds, and lead men into absurdities which at last they see but cannot avoid without reckoning anew from the beginning, in which lies the foundation of their errors; whence it happens that they who trust to books do as they that cast up many little sums into one greater, without considering whether those little sums were rightly cast up or not; and last, finding the error visible, and not mistrusting their first grounds, know not which way to clear themselves, but spend time in fluttering over their books; as birds that enter by the chimney, and finding themselves enclosed in a chamber, flutter at the false light of a glass window, for want of wit to consider which way they came in. Thus in the right definition of names lies the first use of speech, which is the acquisition of science; and in wrong or no definitions lies the first abuse; from which proceed all false and senseless tenets; which make those men that derive their instruction from the authority of books, and not from their own meditation, to be as much below the condition of ignorant men, as men endued with true science are above it. For between true science and erroneous doctrines, ignorance is in the middle. Natural sense and imagination are not subject to absurdity. Nature itself cannot err; and as men abound in copiousness of language, so they become more wise or more mad than ordinary. Nor is it possible, without letters,

for any man to become either excellently wise or, unless his memory be hurt by disease or ill constitution of organs, excellently foolish; for words are wise men's counters, they do but reckon by them; but they are the money of fools that value them by the authority of an Aristotle, a Cicero, or a Thomas, or any other doctor whatsoever, if but a man.[1]

When a man upon the hearing of any speech has those thoughts which the words of that speech and their connexion were ordained and constituted to signify, then he is said to understand it; understanding being nothing else but conception caused by speech; and, therefore, if speech be peculiar to man, as for aught is known it is, then is understanding peculiar to him also: and, therefore, of absurd and false affirmations, in case they be universal, there can be no understanding; though, many think they understand them when they repeat the words softly, or con them in their mind. . . . The names of such things as affect us, that is which please and displease us, because all men are not alike affected with the same thing, nor the same men at all times, are in the common discourses of men of inconstant signification. For seeing all names are imposed to signify our conceptions, when we conceive the same things differently, we can hardly avoid different naming of them. For though the nature of that we conceive be the same, yet the diversity of our reception of it, in respect of different constitutions of body, and prejudices of opinion, gives every thing a tincture of our different passions; and therefore, in reasoning, a man must take heed of words; which, besides the signification of what we imagine their nature, have a signification also of the nature, disposition, and interest of the speaker. Such are the names of virtues and vices; for one man calls wisdom what another calls fear; and one cruelty what another justice; one prodigality what another magnanimity; and one gravity what another stupidity. And, therefore, such names can never be true grounds of any ratiocination. No more

[1] Leviathan, cap. iv.

can metaphors and tropes of speech; but these are less dangerous, because they profess their inconstancy, which the other do not.[1]

When a man reasons he does nothing else but conceive a sum total, from addition of parcels; or conceive a remainder, from subtraction of one sum from another. Reason in this sense is nothing else but reckoning—that is, adding and subtracting of the consequences of general names agreed upon for the marking and signifying of our thoughts, marking when we reckon by ourselves, and signifying when we demonstrate or approve our reckonings to other men.[2]

Reason is not, as sense and memory, born with us; we gather by experience only; as prudence is but obtained by industry; first in apt improving of names; and secondly by getting a good and orderly method in proceeding from the elements which are names to assertions made by connexion of one of them to another, and so to syllogisms, which are the connecting of one assertion to another, till we come to a knowledge of all the consequences of names appertaining to the subject in hand; and that is what men call Science. And whereas sense and memory are but knowledge of fact, which is a thing past and irrevocable, science is the knowledge of consequences, and dependence of one fact upon another, by which, out of that which we can presently do, we know how to do something else when we will, or the like another time; because when we see how any thing comes about, upon what causes, and by what manner, when the like causes come into our power, we see how to make it produce the like effects.[3]

No discourse whatever can end in absolute knowledge of fact past or to come. For as the knowledge of fact, it is originally sense; and even after memory, and for the knowledge of consequence, it is not absolute, but conditional. No man can know, by discourse, that this or that is, has been, or will be, which is to know absolutely; but only that if this be, that is; if this has been,

[1] Leviathan, cap. iv. finis. [2] Ibid. cap. v. [3] Ib. cap. v.

that has been; if this shall be, that shall be; which is to know conditionally; and that not the consequences of one thing to another, but of one name of a thing to another name of the same thing. And therefore, when the discourse is put into speech and begins with the definitions of words, and proceeds by connexion of the same into general affirmations, and of these again into syllogisms, the end or last sum is called the conclusion, and the thought of the mind signified by it is that conditional knowledge of the consequence of words which is commonly called science. But if the first ground of such discourse be not definitions, or if the definitions be not rightly joined together into syllogisms, then the end or conclusion is again opinion, namely, of the truth of something said, though sometimes in absurd and senseless words, without possibility of being understood.[1]

Belief, which is the admitting of propositions upon trust in many cases, is no less free from doubt than perfect and manifest knowledge; for as there is nothing whereof there is not some cause, so where there is doubt there must be some cause thereof conceived. Now there be many things which we receive from the report of others, of which it is impossible to imagine any cause of doubt; for what can be opposed against the consent of all men, in things they can know and have no cause to report otherwise, than they are such as is great part of our histories, unless a man could say that all the world had conspired to deceive him.[2]

The ninth chapter of the Leviathan is on the several subjects of knowledge. There are of knowledge two kinds, whereof one is knowledge of fact, the other knowledge of the consequence of one affirmation to another. The former is nothing else but sense and memory, and is absolute knowledge; as when we see a fact doing or remember it done: and this is the knowledge required in a witness. The latter is called science, and is conditional; as when we know that if the figure shown be a circle, then any straight line through the centre shall divide it

[1] Leviathan, cap. vii. [2] Hum. Nat. c. vi.

into two equal parts. And this is the knowledge required in a philosopher; that is to say of him that pretends to reasoning. The register of knowledge of facts is called history; whereof there are two sorts; one called natural history, which is the history of such facts or efforts of nature as have no dependence on the will; such are the histories of metals, plants, animals, regions, and the like. The other is civil history, which is the history of the voluntary actions of men in a commonwealth. Hobbes then proceeds to give a synoptical chart of science,—that is, knowledge of consequence, or philosophy. This is part divided into natural and civil philosophy. Natural philosophy includes consequences from the accidents common to all bodies natural; which are quantity and motion, and also physics or consequences from quality. This first division of natural philosophy includes geometry, arithmetic, astronomy, geography, mechanics, navigation. Physics is again divided into consequences from the qualities of bodies transient, such as sometimes appear and sometimes vanish,—meteorology; and consequences from the qualities of bodies permanent, such as the stars, the atmosphere, or terrestrial bodies. The consequences from the qualities of bodies terrestrial are divided into consequences from the parts of the earth that are without sense, and consequences from the qualities of animals; these last again are divided into consequences from the qualities of animals in general, under which he reckons optics and music, and consequences derived from the qualities of men in special, which result in ethics, poetry, rhetoric, logic, and the science of the just and unjust.[1]

This is the substance of the philosophy of Hobbes so far as it relates to the intellectual qualities. Next follows the analysis of the passions. We now approach those portions of his philosophy which have always excited indignation. Nor can we conceive how it was possible for one possessed of the intellect of our author to attempt

[1] Leviathan, cap. ix.

to construct a scheme of society by ignoring the social affections of mankind.

Hobbes in his analysis of the passions and affections, thrusts forward the selfish system in its most repulsive form. And the definitions on these subjects in The Human Nature and the Leviathan, distort facts of which all men are conscious, and do violence to the language in which the result of their uniform experience is conveyed. Thus, according to his theory, "acknowledgment of power is called Honour;"—"Pity is the imagination of future calamity to ourselves, proceeding from the sense of another man's calamity;"—"Laughter is occasioned by sudden glory in our eminence, or in comparison with the infirmity of others;"—"Love is a conception of his need of the one person desired;"—"Good will or charity, which containeth the natural affection of parents to their children, consists in a man's conception that he is able not only to accomplish his own desires, but to assist other men in theirs;"—from which it follows, as the pride of power is felt in destroying as well as in serving men, that cruelty and kindness are the same passion. Such a definition of Love, as it excludes kindness, might perfectly well comprehend the hunger of a cannibal, provided it were not too ravenous to exclude choice. These were the expedients to which Hobbes was driven in order to evade the admission of the simple truth, that there are in our nature disinterested passions, which seek the well-being of others as their object and end.[1]

The eleventh chapter of the Leviathan is on Manners, by which Hobbes means those qualities of mankind which concern their living together in peace and unity. This is full of the selfish system. Competition of riches, honour, command, or other power, inclines to contention, enmity, and war; because the way of one competitor to the attaining of his desire is to kill, subdue, supplant, or repel the other. Particularly competition of praise inclines to a reverence of antiquity; for men contend with the living, not with the dead—to these

[1] Mackintosh, Eth. Phil.

ascribing more than due that they may obscure the glory of the other. Love of virtue is stated to arise from love of praise; whilst, to have received from one to whom we think ourselves equal greater benefits than there is hope to requite, disposes to counterfeit love, but really secret hatred, and puts a man into the estate of a desperate debtor, that in declining the right of his creditor, tacitly wishes him there, where he might never see him more. For benefits oblige, and obligation is thraldom; and unrequitable obligation perpetual thraldom. But to have received benefits from one whom we acknowledge far superior inclines to love; because the obligation is no new depression; and cheerful acceptation, which men call gratitude, is such an honour done to the obligee as is taken generally for retribution. Also to receive benefits, though from an equal or inferior, as long as there is hope of requital, disposes to love; for in the intention of the receiver, the obligation is of aid and service mutual, from whence proceeds an emulation of who shall exceed in benefiting; the most noble and profitable contention possible, wherein the victor is pleased with his victory, and the other revenged by conferring it.[1]

Eloquence, with flattery, disposes men to confide in them that have it; because the former is seeming wisdom, the latter, seeming kindness. Add to them military reputation; and it disposes men to adhere and subject themselves to those men that have them;—the two former having given them caution against danger from him, the latter gives them caution against danger from others. Want of science, that is, ignorance of causes, disposes, or rather constrains, a man to rely on the advice and authority of others. For all men, whom the truth concerns, if they rely not on their own, must rely on the opinion of some other, whom they think wiser than themselves, and see not why he should deceive them. Ignorance of the signification of words, which is want of understanding, disposes men to take on trust,

[1] Leviathan, cap. ix.

not only the truth they know not, but also the errors; and, which is more, the nonsense of them they trust; for neither error nor nonsense can, without a perfect understanding of words, be detected.[1]

Ignorance of the causes and original constitution of right, equity, law, and justice, disposes a man to make custom and example the rule of his actions, in such manner as to think that unjust which it hath been the custom to punish; and that just, of the impunity and approbation whereof they can produce an example; or, as the lawyers, who use only this false measure of justice, barbarously call it, a precedent—like little children, that have no other rule of good and evil names, but the correction they receive from their parents and masters —save that children are constant to their rule, whereas men are not so, because, grown old and stubborn, they appeal from custom to reason, and from reason to custom, as it serves their turn: receding from custom when their interest requires it, and setting themselves against reason as oft as reason is against them, which is the cause that the doctrine of right and wrong is perpetually despised both by the pen and sword; whereas the doctrine of lines and figures is not so, because men care not in that subject what be truth, as a thing that crosses no man's ambition, profit, or lust. "For I doubt not," says Hobbes, "that if it had been a thing contrary to any man's right of dominion, or to the interest of men that have dominion, that the three angles of a triangle should be equal to the two angles of a square, that doctrine should have been, if not disputed, yet by the burning of all books of geometry, suppressed, as far as he whom it concerned was able."[2]

The Ethical system of Hobbes excluded all the benevolent and social affections of our nature. Moral good he considers merely as consisting in the signs of a power to produce pleasure; and repentance is no more than regret at having missed the way; so that, according to this system, a disinterested approbation of, and reverence

[1] Leviathan, cap. ix. [2] Ib. cap. x.

for virtue, are no more possible than disinterested affections towards our fellow-creatures. There is no sense of duty, no compensation for our own offences, no indignation against the crimes of others, unless they affect our own safety—no secret cheerfulness shed over the heart by the practice of well doing. From his philosophical writings it would be impossible to conclude that there exists in man a set of emotions, desires, and aversions, of which the sole and final objects are the voluntary actions and habitual dispositions of himself and of all other voluntary agents;—which are properly called moral sentiments, and which, though they vary more in degree, and depend more on cultivation, than some other parts of human nature, are seldom found to be entirely wanting.[1]

It must be observed that in Hobbes' system of Politics the treatises *De Cive*, *De Corpore Politico*, and the *Leviathan*, bear nearly the same relation to one another as Bacon's Advancement of Learning does to the treatise De Augmentis Scientiarum; and as the first edition of Vico's Scienza Nuova does to the second.

Wisdom is the perfect knowledge of truth in all matters whatsoever. This being derived from the registers and records of things, cannot possibly be the work of a sudden acuteness, but of a well-balanced reason, which, by the compendium of a word, we call philosophy. And the tree of philosophy divides itself into so many branches, as there are sorts of things which properly fall within the cognizance of reason.[2] In the treatise on Government and Society, Hobbes proposes briefly to describe the duties of men, first as men; then as subjects; lastly, as Christians. Under which duties, he says, are contained not only the elements of the laws of nature and nations, and with the true original and power of justice; but also the very essence of the Christian religion itself. In that part of the work entitled "Liberty," he proceeds to demonstrate, in the first place, that the state of men without civil society, which

[1] Mackintosh, Eth. Phil. [2] Elementa Philosophica de Cive, Epist. Dedicat.

state is termed the state of nature, is nothing else but a mere war of all against all; and in that war all men have equal rights to all things. But men, as soon as they arrive to understanding of this hateful condition, desire, even nature itself compelling them, to be freed from this misery. And as this cannot be done, except by compact, they all quit that right they have to all things. He then declares and confirms what the nature of that compact is, how and by what means the right of one might be transferred to another, to make their compacts valid, and what those dictates of reason are which may properly be termed the laws of nature. These grounds being laid in the part of the work entitled "Dominion," he shows what civil government is, and the supreme power in it, and the different kinds of it.[1]

The faculties of human nature may be reduced, according to Hobbes, into four kinds—bodily strength, experience, reason, and passion. Taking the beginning of his doctrine from these, he proposes to declare, in the first place, what manner of inclinations men who are endowed with these faculties bear towards one another, and whether and by what faculty they are born apt for society; then to show what are the conditions of society, or of human peace,—that is to say, changing the words only,—what are the fundamental laws of nature.

The opinion of the Greek philosophers is controverted, who suppose that man is a creature born fit for society, and term him ζῶον πολίτικον. All society, says Hobbes, in a vicious train of false reasoning, is either for gain or for glory—that is, not so much for love of our fellows as for the love of ourselves. But no society can be great or lasting, which begins from vain-glory. Because that glory is like honour; if all men have it, no man hath it,—for they consist in comparison and pre-excellence. Neither does the society of others advance any whit the cause of my glorying in myself; for every man must account himself such as he can make himself without the help of others. But though the benefits of this

[1] De Cive, Preface.

life may be much furthered by mutual help, yet, since those may be better attained by dominion than the society of others, no one will doubt but that men would much more greedily be carried by nature, if all fear were removed, to obtain dominion than to gain society. It is, therefore, concluded by Hobbes that the original of all great and lasting societies consisted not in the good-will men had towards one another, but in mutual fear.[1]

All men are by nature equal. Amongst the many dangers with which the natural desires of men threaten one another, to take care of one's self is the most important concern. For every man is desirous of what is good for him, and shuns what is evil, but chiefly the chiefest of natural evils—death. And this is done by an impulsion of nature no less than that whereby a stone moves downward. It is, therefore, agreeable to right reason for a man to use all his endeavours to preserve and defend himself from all dangers. And all men account that right which is agreeable to right reason. For nothing else is signified by the word right, than that liberty which every man has to use his natural faculties according to right reason. Therefore the first foundation of natural right is this,—that every man may, as far as he can, protect his life and limbs:—Itaque juris naturalis primum fundamentum est, ut quisque vitam et membra sua quantum potest tueatur.[2]

Nature has given to every man a right to all; that is, it was lawful for every man, in the bare state of nature, to possess, use, and enjoy all that he could. But it was the least benefit for men thus to have a common right to all things. For the effects of this right are the same almost as if there had been no right at all. For although every man might say of every thing, this is mine, yet could he not enjoy it, by reason of his neighbour, who, having equal right and power, would pretend the same thing to be his. Thus a state of man without society is the state of war; and nature dictates the seeking after peace.[3]

[1] De Cive, cap. i. s. 2. [2] Ibid. cap. i. s. 7. [3] Ibid. cap. i. ss. 10–15.

Since all grant that is done by right which is not done against reason, those actions only ought to be judged wrong which are repugnant to right reason, that is, which contradict some certain truth collected by right reasoning from true principles. But that which is done wrong, we say is done against some law; therefore, true reason is a certain law, which, since it is no less a part of human nature, than any other faculty or affection of the mind, is also termed nature. Therefore the law of nature is the dictate of right reason conservant about those things which are either to be done or omitted for the constant preservation of life and limbs:—Est igitur lex naturalis dictamen rectæ rationis circa ea quæ agenda vel omittenda sunt ad vitæ membrorumque conservationem, quantum fieri potest, diuturnam.[1]

The first and fundamental Law of Nature is, that peace is to be sought after wherever it may be found, and where not that we must provide ourselves with the aids for war. And one of the natural laws derived from this fundamental one is this: that the right of all men to all things ought not to be retained; but that some certain rights ought to be transferred or relinquished. For if every one would retain his right to all things, it must necessarily follow, that some by right might invade, and others by the same right might defend themselves against them. Hence war would follow.[2]

After this follow dissertations on the abandonment and transfer of rights. A contract is the act of two in transferring their rights. A covenant is an act wherein we pass away our rights by words signifying the future. From contracts or covenants we are freed in two ways—by performance or by release.[3]

The second Law of Nature is to perform contracts, or to keep faith. In the third chapter De Cive, on the remaining Laws of Nature, Hobbes gives a brief code of morality. And the moral and natural laws are declared to be the same. The observance of justice is never against reason; for if ever its violation may have turned

[1] De Cive, cap. ii. s. i. [2] Ibid. s. 3. [3] Ibid. ss. 9–15.

out unsuccessfully, this being contrary to probable expectation ought not to influence us. That which gives to human actions the relish of justice is a certain nobleness or gallantness of courage rarely found; by which a man scorns to be beholden for the contentment of his life to fraud or breach of promise.[1]

The laws of nature oblige *in foro interno;* that is to say, they bind to a desire they should take place; but *in foro externo*, that is, to the putting them in act, not always. For he that should be modest and tractable, and perform all he promises in such time and place, where no man else should do so, should but make himself a prey to others, and procure his own certain ruin, contrary to the ground of all laws of nature, which tend to nature's preservation. And again, he that having sufficient security that others shall observe the same laws towards him, observes them not himself, seeketh not peace but war; and consequently the destruction of his nature by violence. And whatsoever laws bind *in foro interno*, may be broken, not only by a fact contrary to the law, but also by a fact according to it, in case a man think it contrary; for though his action in this case be according to law, yet his purpose was against the law; which, where the obligation is *in foro interno*, is a breach. The laws of nature are immutable and eternal; for injustice, ingratitude, arrogance, pride, iniquity, acception of persons, and the rest, can never be made lawful; for it can never be that war shall preserve life, and peace destroy it.[2]

The fifth chapter of the treatise De Cive treats of the causes and first beginning of civil government. It is manifest that the actions of men proceed from the will, and the will from hope and fear, inasmuch as where they shall see a greater good or less evil likely to happen to them by the breach than by the observation of the laws, they will knowingly violate them. The hope, therefore, which each man has of his security and self-preserva-

[1] Leviathan, cap. xv. [2] Ibid.

tion, consists in this, that by force or craft he may disappoint his neighbour; wherefore, says Hobbes, the laws of nature suffice not for the preservation of peace.

The seventeenth chapter of the Leviathan, corresponding to the fifth chapter De Cive, is entitled Of the Causes, Generative and Definitive, of a Commonwealth. The final cause, end, or design of men who naturally love liberty and dominion over others, in the introduction of that restraint upon themselves, in which we see them live in commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war which is necessarily consequent to the natural passions of men, when there is no visible power to keep them in awe, and tie them, by fear of punishment, to the performance of their covenants and the observation of the laws of nature; for the laws of nature, as justice, equity, modesty, mercy, and in one word,—doing to others as we would be done to, of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions. For covenants without the sword are but words, and of no strength to secure a man at all. Nor is it the joining together of a small number of men that gives them this security. And, also, if there be ever so great a multitude; yet, if their actions be diverted according to their particular judgments, and particular appetites, they can expect thereby no defence nor protection neither against a common enemy, nor against the injuries of one another; for being distracted in opinions concerning the best use and application of their strength, they do not help but hinder one another; and reduce their strength by mutual opposition to nothing; whereby they are easily not only subdued by a very few that agree together, but also, when there is no common enemy, they make war upon each other, for their particular interests; for if we could suppose a great multitude of men to consent in the observation of justice, and other laws of nature without a

common power to keep them all in awe, we might as well suppose all mankind to do the same; and then there neither would be, nor need to be, any civil government or commonwealth at all; because there would be peace without subjection.[1]

The only way to erect such a common power as may be able to defend men from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such good as that, by their own industry and by the fruits of the earth, they may nourish themselves and live contentedly, is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, into one will, which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person shall act, or cause to be acted, in those things which concern the common peace and safety, and therein to submit their wills, every one to his will, and their judgments to his judgment. This is more than consent or concord, it is a real unity of them all in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man, I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that these give up their right to him, and authorize all his actions in like manner. This is the generation of the great Leviathan, or mortal God, to whom, under the immortal God, we owe our peace and defence; in him is the essence of the commonwealth; he is the King of the Sword; yet there is that in heaven, though not on earth, of which he should stand in fear.[2]

This person, including an assembly as well as an individual, is the sovereign, and possesses sovereign power. Such power may be acquired in two ways—by agreement or by force. A commonwealth is said to be instituted when a multitude of men agree that whatever the ma-

1 Leviathan, cap. xvii. 2 Ib. c. p. xvii. xxviii.

jority agree to shall bind the whole. The consequences of this are, that the subjects cannot change the form of government, nor can the sovereign power be forfeited. No man can, without injustice, protest against the constitution of the sovereign declared by the majority. Again, because every subject is, by this institution, author of all the actions and judgments of the sovereign instituted, it follows that whatsoever he does it can be no injury to any of his subjects, nor ought he to be by any of them accused of injustice, for he that does any thing by authority from another does therein no injury to him by whose authority he acts; but by this institution of a commonwealth every particular man is author of all the sovereign does; and consequently he that complains of injury from his sovereign, complains of that whereof he is himself author, and therefore ought not to accuse any man but himself; no nor himself of injury, because to do injury to oneself is impossible. It is true that they that have sovereign power may commit iniquity, but not injustice or injury, in their proper signification.[1]

The sovereign is judge of whatever is necessary for the peace or defence of his subjects; is judge of what doctrines ought to be taught them; has the right of making rules whereby the subjects may every man know what is so his own as no other subject can, without injustice, take it from him; to him also belongs the right of judicature, of making war and peace, of choosing all counsellors and ministers, of rewarding and punishing. These rights are indivisible and incommunicable, and by no grant can pass away without direct renunciation of the sovereign power.[2]

There are three simple forms of government—monarchy, aristocracy, and democracy. The first is lavishly extolled. Where the public interest and private interest are most closely united there is the public most advanced. But in monarchy the private interest is the same with the public. The riches, power, and honour of a monarch

[1] Leviathan, cap. xviii. [2] Ibid.

arise only from the riches, strength, and reputation of his subjects. For no king can be rich, nor glorious, nor secure, whose subjects are either poor or contemptible, or too weak through want or dissension, to maintain a war against their enemies; "whereas in a democracy or aristocracy," says Hobbes, "the public prosperity confers not so much to the private fortune of one that is corrupt or ambitious, as doth many times a perfidious advice, a treacherous action, or a civil war." A monarch receives counsel when, where, and of whom he pleases. But when a sovereign assembly has need of counsel none are admitted except such as have a right thereto from the beginning. The resolutions of a monarch are subject to no other inconsistency than that of human nature; but in assemblies, besides that of nature, there arises an inconsistency from the number. A monarch cannot disagree with himself out of envy or interest, but an assembly may, and that to such a height as may produce a civil war.[1]

In monarchy there is this inconvenience: that any subject, by the power of one man, for the enriching of a favourite or flatterer, may be deprived of all he possesses. But the same may as well happen in a sovereign assembly. For their power is the same, and they are as subject to evil counsel, and to be seduced by orators, as a monarch by flatterers; and whereas the favourites of monarchs are few, and they have none to advance but their own kindred, the favourites of an assembly are many, and the kindred much more numerous than of any monarch. Besides, there is no favourite of a monarch who cannot as well succour his friends as hurt his enemies; but orators—that is to say, favourites of sovereign assemblies—though they have great power to hurt, have little to save. For to accuse requires less eloquence than to excuse. Such is man's nature.[2]

The elective or limited king is not the sovereign, but the minister of the sovereign. The question of the right of succession takes place only in an abso-

[1] Leviathan, cap. xix. [2] Ibid.

lute monarchy. For those who exercise the supreme power for a time only are no monarchs but ministers of state. Hobbes strangely decides that a monarch may dispose of his government by testament, or give it away, or sell it. A monarch dying without a will is, however, understood to will that a monarch should succeed him, and further, one of his sons. But because the sons are equal, and the power cannot be divided, the eldest shall succeed. For if there be any difference, by reason of age the eldest is supposed the most worthy. But if the brothers must be equally valued, the succession shall be by lot. Now primogeniture is a natural lot, and by this the eldest is already preferred.[1]

The twelfth chapter De Cive discusses the internal causes tending to the dissolution of government. The following opinions are condemned by Hobbes as seditious and adverse to civil society:—That the judging of good and evil belongs to private persons; that subjects may sin by obeying their princes; that tyrannicide is lawful; that those who have the supreme power are subject to the civil laws; that the supreme power may be divided; that each subject has a property or absolute dominion of his own goods.[2]

All the duties of rulers are contained in the one sentence—*salus populi, lex suprema.* For although they who amongst men obtain the chiefest dominion cannot be subject to laws, properly so called, that is to say, to the will of men, because to be chief and subject are contradictory; yet it is their duty in all things, as much as possibly they can, to yield obedience to right reason, which is the natural, moral, and divine law. But because empires were constituted for the sake of peace, he who, being placed in authority, shall use his power otherwise than to the safety of the people, will act against the reasons of peace, that is to say, against the laws of nature. The benefits of subjects respecting this life only may be distributed into four kinds:—that they be defended against foreign enemies; that peace be preserved at home;

[1] De Cive, cap. ix. ss. 9–19. [2] Ibid cap. xii. 1–7.

that they be enriched as much as may consist with public security; that they enjoy a harmless liberty. For supreme commanders can confer no more to their civil happiness than that being preserved from foreign and civil wars they may quietly enjoy that wealth which they have purchased by their own industry.[1]

A right instruction of subjects in civil doctrines is necessary for the preservation of peace; and there ought to be an equal distribution of public burthens. Hobbes argues against an income-tax, and erroneously decides in favour of indirect against direct taxation.[2]

Law has been often confounded with counsel, covenant, and right. The distinction between counsel and law must be fetched from the distinction between counsel and command. Counsel is a precept in which the reason of obeying is taken from the thing itself which is advised, but command is a precept in which the cause of my obedience depends on the will of the commander. For "sic volo, sic jubeo," is not properly said unless the will stand for the reason. Now when obedience is yielded to the laws, not for the thing itself, but for the will of the adviser, law is not a counsel but a command, and is defined as the command of that person, whether man or court, whose command contains the reason of obedience: "Lex est mandatum ejus personæ sive hominis sive curiæ, cujus præceptum continet obedientiæ rationem."[3]

"Law," says Hobbes, "is confounded with covenant by those who conceive the laws to be nothing else but certain ὁμολογήματα, or forms of living determined by the common consent of men. Among whom is Aristotle, who defines law thus:—Νόμος ἔστι λόγος ὡρίσμενος καθ' ὁμολόγιαν κόινην πόλεως, μηνύων πῶς δεῖ πράττειν ἕκαστα; that is to say, law is a speech, limited according to the common consent of the city, declaring every thing that we ought to do."[4] However, it appears that the opinion of Aristotle, declaring laws to spring from the consent of the people, is preferable to that of Hobbes, declaring them to spring

[1] De Cive, cap. xiii. ss. 1–6.
[2] Ibid. cap. xiii. s. 11.
[3] Ibid. cap. xiv. s. 1.
[4] Ibid. cap. xiv. s. 2.

from the will of the legislator; though unquestionably whatever will be enforced by the supreme authority is a law.

After discussing in the Leviathan the various religious subjects mentioned in the Preface, Hobbes concludes by a review of the whole. From the contrariety of some of the natural faculties of the mind one to another, as also of one passion to another, and from their reference to conservation, there has been an argument taken to infer an impossibility that any one man should be sufficiently disposed to all sorts of civil duty. The severity of judgment, it is said, makes men censorious, and unapt to pardon the errors and infirmities of other men; and, on the other side, celerity of fancy makes the thoughts less steady than is necessary to discern exactly between right and wrong. Again, in all deliberations, and in all pleadings, the faculty of solid reasoning is necessary, for without it the resolutions of men are rash, and their sentences unjust; and yet, if there be not powerful eloquence, which procures attention and consent, the effect of reason will be little. But these are contrary faculties, the former being grounded upon principles of truth, the other upon opinions already received, true or false; and upon the passions and interests of men, which are different and mutable. And, considering the contrariety of men's opinions and manners in general, it is said to be impossible to entertain a constant civil amity with all those with whom the business of the world obliges us to converse, which business consists almost in nothing else but a perpetual contention for honour, riches, and authority. To which Hobbes answers, that they are indeed great difficulties, but not impossibilities, for by education and discipline they may be and are sometimes reconciled. Judgment and fancy may have place in the same man, but by turns, as the end which he aims at requires. So also reason and eloquence, though not, perhaps, in the natural sciences, yet in the moral, may stand very well together. For wheresoever there is place for adorning and preferring of error, there is much more place for

adorning and preferring of truth, if they have it to adorn. Nor is there any repugnance between fearing the laws and not fearing a public enemy, nor between abstaining from injury and pardoning it in others.[1]

To the laws of nature already enumerated there should be this added, that every man is bound by nature, as much as in him lies, to protect in war the authority by which he himself is protected in time of peace. For he that pretends a right of nature to preserve his own body, cannot pretend a right of nature to destroy him by whose strength he is preserved.[2]

Hobbes, in conclusion, says: "There is nothing in this whole discourse, nor in that I writ before of the same subject in Latin, as far as I can perceive, contrary either to the Word of God, or to good manners, or to the disturbance of the public tranquillity. Therefore I think it may be profitably printed, and more profitably taught in the universities, in case they also think so, to whom the judgment of the same belongeth. For seeing the universities are the fountains of civil and moral doctrine, from whence the preachers and the gentry, drawing such water as they find, use to sprinkle the same both from the pulpit and in their conversation upon the people, there ought certainly to be great care taken to have it pure, both from the renown of heathen politicians and from the incantation of deceiving spirits. And by that means the most men, knowing their duties, will be the less subject to serve the ambition of a few discontented persons in their purposes against the state, and be the less grieved with the contributions necessary for their peace and defence; and the governors themselves have the less cause to maintain at the common charge any greater army than is necessary to make good the public liberty, against the invasions and encroachments of foreign enemies. And thus I have brought to an end my Discourse of Civil and Ecclesiastical Government, occasioned by the disorders of the present time, without partiality, without application, and without other designs

[1] Leviathan, Part IV. [2] Ibid.

than to set before men's eyes the mutual relation between protection and obedience, of which the condition of human nature and the laws divine, both natural and positive, require an inviolable observation."[1]

The anticipation that Hobbes entertained of his philosophical opinions being publicly taught in the universities of the realm, has never been, and probably never will be realized. Seldom has any book excited the clamour of opposition which the Leviathan encountered. "The philosopher of Malmesbury," says Dr. Warburton, "was the terror of the last age, as Tindall and Collins are of this. The press sweats with controversy, and every young churchman militant would try his arms in thundering on Hobbes's steel cap."[2] In effect Hobbes stood in opposition to every party of the political and ecclesiastical world in which he lived. By his determined advocacy of absolutist principles he alienated the Republicans. There could be no community of feeling or interest between those who on the one side advocated the rights of man, his natural liberty, his duty to resist oppression, and the philosopher who on the other side maintained that the ruling power could not be withdrawn from those to whom it had been committed, that sovereigns ought not to be punished for misgovernment; that the interpretation of the laws was to be sought not from the comments of philosophy, but from the authority of the ruler; that the will of the magistrate was the ultimate standard of right and wrong; and that his voice must be listened to by every citizen as the voice of conscience. Again, Hobbes protested against all ecclesiastical tyranny and sought to subject the consciences of men almost solely to the civil power. His enemies found abundance of passages in his works to justify their attacks upon his atheistical doctrines, his materialist philosophy; whilst in his ethical and political systems alike he ignored all the social affections of mankind. With Hobbes "there is no sense of duty, no compunction for our own offences, no indignation against the crimes of others, unless they

[1] Leviathan, Part IV. [2] Divine Legation, vol. ii. p. 9.

affect our own safety; no secret cheerfulness shed over the heart by the practice of well doing."

"Such," says Dr. Whewell,[1] "are the consequences which result from taking man divested of any moral principles as the element of the world, and building up the frame of civil society by the mere juxtaposition of individuals. In this way is formed that great Leviathan, which in this system establishes and rules over all human institutions, and even determines what shall be held as divine. In reading this account we are almost led to imagine to ourselves a monstrous idol composed of human beings, yet invested with the attributes of superhuman power, and worshipped as the creator of Justice and Law, Peace and Order, Truth and Religion. But, perhaps, you think such an image too strange, too monstrous, too terrible to be steadily dwelt upon. Not so. It is the image offered to us by the author of the Leviathan himself; offered, too, not in the vague lineaments and airy colours which words bestow, in which so many an uncouth and extravagant figure is presented without offending us, but carefully drawn as a visible picture in lines and shades. It is the frontispiece of his book, and I think no one can look at the representation without discovering in it a kind of grotesque sublimity. This is the picture:—Over a wide-spreading landscape, in which lie villages and cultivated fields, castles and churches, rivers and ports, predominates the vast form of the Sovereign, the Leviathan, the Mortal God. Its breast and head rise beyond the most distant hills, its arms stretch to the foreground of the picture. Its body and members are composed of thousands upon thousands of human figures, in the varied dresses of all classes of society, all with their faces turned towards the sovereign head, and bending towards it in attitudes of worship. The head has upon it a kingly crown, the right hand bears a mighty sword, the left a magnificent crosier. In the front of the picture is a city, with its gates and streets, its bastions and its citadel, in which

[1] History of Moral Philosophy in England, p. 19.

high above all other edifices rise the towers of a noble cathedral. Nor is this figure, thus predominating over the country and the city, the only intimation how vast and comprehensive, how strong and terrible, is the power thus bodied forth. Below in various compartments are emblems of the provinces and instruments of this power; on one side, a castle on a rock, from the battlements of which the smoke rolls, as a piece of ordnance is discharged; on the other a church, with a figure upon its roof of Faith, holding her cross; on one side the coronet, on the other the mitre. On the one side is a cannon—the thunderbolt of war, on the other the thunderbolts in their mythological form, indicating, perhaps, the fulminations of the ecclesiastical sovereign. On the one side are the peaceable arms of Logic, Syllogism, and Dilemma—spiritual and temporal arguments, on the other the sharper arguments of martial arms, to be used by nations when reason fails—lances and firelocks, drums and colours. Finally, on one side the judiciary tribunal, seated in solemn order, with their dark robes and formal caps, on the other the more stormy tribunal of the battle-field—the charge of hostile armies, sloping spears bristling through volumes of smoke, the combat of horse and foot, the victors and the dying. Nor must I pass unnoticed the physiognomy of the supreme figure itself. In the common editions the face has a manifest resemblance to Cromwell (the work was published in 1651), although it wears, as I have said, a regal crown; and in these the engraving is well executed and finished. But in the copy belonging to Trinity College library the face appears to be intended for Charles the First. The engraving of this copy is very much worse than the other, and is not worked into the same careful detail by the artist, although the outline is the same; and the text of the book is a separate and worse impression, although the errata are the same with the other copies, as well as the date. How Hobbes himself or any other person should come to print the Leviathan in this manner, I am quite unable to explain."

Much truth exists in Hobbes's scheme of politics. It is not easy to controvert the proposition that in the original phase of savage life men are in a state of war, or in other words, employ force of every kind in seizing to themselves what is in the possession of others. A personage in Plautus says—

"Homo homini ignoto lupus est."

And this opinion is certainly true of all who are in the lowest stage of civilization. An Indian meeting a stranger grasps his arms as surely as a dog in a country house barks at an unusual noise, or an unexpected guest. In most languages the words for stranger and enemy are originally the same. Truth, Honesty, and Benevolence are seldom found developed in the lowest types of man; nor have such tribes much more affection for their women and children than is common to the whole animal kingdom, and necessary to its existence. Hobbes, however, ignored that if selfishness be natural, sociability is also natural, benevolence is natural. Men do good for the love of God, and for the happiness of doing good. Hobbes transplanted the savage with all his original evil qualities into the heart of civilized society, and imagined that civilization for such persons could be maintained even by a despotism. The theory of development was unknown in that age. Hobbes supported despotism whether exercised by Charles, or by Cromwell. He was exasperated by the democracy which had inspired Milton.

It may be admitted that taking man as Hobbes imagined him to be, the only proper government is a despotism. In fact, we perceive all over the world that despotisms are the only secure governments for men in a certain stage of civilization. But it is impossible for us to understand how Hobbes could imagine the same constitution fit for Morocco and for England; or how he could maintain that the distinctions of right and wrong, good and evil, are made by the laws, that no man can do amiss who obeys the sovereign authority, and that

our religion must always conform to that of the State in which we live.

Neither the doctrines nor the errors of Hobbes had much influence at the period of their publication. The friends of Liberty easily overthrew his paradoxes. On their side the supporters of the Stuarts and of the Restoration were scandalized at the theories which such an auxiliary furnished them with, and which might have been taken either as a satire upon them, or as an apology for despotical power. If Machiavelli were immoral without knowing it, he has at least balanced the inconveniences of his own theories by that spirit of history which has made his works a school of Policy. No similar profit could be drawn from the writings of Hobbes.

2. Spinosa, 1632–1677.

Works: Tractatus Theologico-Politicus: Amsterdam, 1670, 4to. Opera Philosophica Omnia, edited by Gfrörer: Stuttgard, 1830–1831.

Authorities: Janet, Histoire de la Philosophie Morale et Politique. Jacobi, Ueber die Lehre des Spinosa: Breslau, 1785. Lerminier, Histoire du Droit.

Spinosa[1] is generally classed with Hobbes. By natural laws, in the first place, he understands the laws of the nature of each individual, according to which he is determined to exist and act in a particular manner. This definition corresponds with that of the Institutes. The first principle of natural law, according to Spinosa, is, that right extends as far as power. All persons when they act obey their nature, which is only a part of universal nature; they all have a right of acting as seems good to them, and of going where their interests drive them, for they do nothing except by virtue of their natural power. It follows from these principles, says Spinosa, that natural law forbids nothing that we can desire and can have. It does not forbid rivalry, hatred, or stratagem; and this is not wonderful, for nature is not confined within the laws of human reasoning, which have relation only to the utility and preservation of man, but

[1] Spinosa, b. at Amsterdam, 1632, d. 1677.

they are composed of an infinity of laws relative to the eternal order of nature, of which man is only a part.

These principles conduct to propositions absolutely identical with those of Hobbes. All men having the same right and obeying the same passions are naturally enemies, consequently the state of nature is the state of war. By the law of nature man obeys the general laws of things. By reason he obeys the laws of his own nature. Reason when counselled tells him that what is most useful for man is the society of men, that peace is better than war, love than hatred.

The end of the state is to make men live in concord and peace, in justice and charity; finally, to place them under the government of reason, the principle of liberty. The state, though armed with absolute sovereignty, should exist only to assure the liberty of citizens. The sovereign may use his absolute right in an extravagant and violent manner; but in so doing he dissolves the state.

Although in theory the sovereign may have here absolute power, yet the individuals composing the people never yield up the entire of their rights, faculties, and powers. There is one portion always reserved by subjects—the power and right of thinking as each one pleases.[1] Opinions are the property of every man. Were we even to wish it, we could not alienate that liberty of thought which is the essence of the human intellect.

It is unnecessary to give the details of the political platform of Spinosa; it embraced the idea of a representative monarchy, with a communist scheme of property. Notwithstanding the differences in detail of Hobbes and Spinosa, the common foundation of their theories is absolutism, the unrestrained power of the state, whatever be its form, popular, aristocratical, or regal. The principle of Hobbes, that each person has his right over all things—the principle of Spinosa, that right is measured by power, are the principles of absolutism. These principles would be right if there were

[1] Theolog. Politic. c. xx.

no natural distinction between the just and the unjust. If nothing be just naturally, there is no natural law. If there be no natural law, the state fixes Right. Right becomes the creature of the state. The denial of the intrinsic rectitude or wickedness of things leads necessarily to the Despotism whether of one, of many, or of all.

The great defects of the system of Hobbes and Spinosa were that this system eliminated from consideration all the social and benevolent affections of mankind. Their selfish plan of human life is now exploded.

3. Sir Matthew Hale, 1609-1676.

Works: "London Liberty, or an Argument of Law and Reason," 1650–1682. "The pleas of the Crown," 1678, 8vo; continued by Jacob, and reprinted, 1716: 7th edition, 1773. "Treatise showing how useful, &c., the enrolling and registering of all conveyances of land," 1694, 4to; and 1756. "Tractatus de Successionibus apud Anglos," 1700 and 1735, 8vo. "Analysis of the Law." History of the Common Law of England," 1713, 8vo; 4th edition, 1779; 5th edition, 1794, 2 vols. 8vo, by Mr. Sergeant Runnington. "History of the Pleas of the Crown," 1739, 2 vols. fol.; 1772, 2 vols. 8vo; and 1800.

Sir Matthew Hale wrote his Analysis of the Civil Part of the Law in 1650, but it was not published until after his death. Sir William Blackstone has characterized this tractate as the most natural, scientifical, and comprehensive of all the schemes then made public for digesting the laws of England.

Hale states the nature of the Analysis in his preface. He makes an essay of reduction of the several titles of law into distributions and heads, according to an analytical method. And although the laws of England are generally divided into the Common Law and Statute Law, he correctly does not distribute the analysis according to that method, but takes in and includes them both together as constituting one common bulk or matter of the laws of England. The laws respect first, civil rights, secondly, crimes or misdemeanours. It is true that the very word civil also includes matters criminal. But it is sufficient to use expressions such as are proper to express the thing intended, or such as by usage are generally understood as applicable.

The civil part of the law concerns civil rights, wrongs relative to such rights, and relief applicable to such wrongs. Rights arising from the relations of persons are of three kinds—political, economical, and civil. Political rights arise between magistrate and subject; economical rights, between husband and wife, parent and child, master and servant; civil rights between ancestor and heir, lord and tenant, guardian and pupil, lord and villein. This last title happily both in Hale's time and our own is antiquated; and for the law relating to it I refer to Littleton. This division is erroneous in including master and servant in the second division of rights; and a more general proper term for the third division would be rights arising from contract.

Hale follows the old erroneous division of rights into jura personarum and jura rerum. There are indeed rights of persons in respect to one another, and rights of persons in regard to things; but the same general principles of right are applicable to each. But of necessity, in analyzing the English law, he was compelled to follow the division of things into real and personal, and the division of personal things into things in possession and in action. Under the rights of property came the considerations of the kinds of those rights; the capacities wherein they are held; and the manner of their being acquired or transferred. Property is either in possession, action, or mixed. The property of things in action is an interest by suit or order of law to demand the things themselves or damages for them. Property in possession is either simple or special. Special property is of two kinds,—either that in which some other has a concurring interest with the proprietor, or that in which his property is but temporary. The former kinds of special property are various, as bailment, pledges, conditional interests, and distress. Temporary property exists in things feræ naturæ. The capacity in which property may be possessed is twofold: in jure proprio, and in jure alterius; and the latter again is of two kinds, as the property of a corporation, or of an executor. As to the acquisition of

property, Hale lays down the rule that personal things may be acquired by act of law, or of the party, or by a mixed act consisting of both. Enough has now been given of the Analysis to show the scientific method upon which Sir Matthew Hale proceeded.

Sir Matthew Hale has left us in his own handwriting the following things necessary to be had continually in remembrance:—"That in the administration of justice I am intrusted for God, the king, and the country, therefore, that it must be done uprightly, deliberately, resolutely; that I suffer not myself to be prepossessed with any judgment at all till the whole business and both parties be heard; that in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country. If in criminals it be a measuring cast to incline to mercy and acquittal, in criminals that consist merely in words, when no more harm ensues, moderation is no injustice."

4. The "Oceana" of James Harrington[1] does not require any extended notice. The "Oceana" was dedicated to Cromwell. In the original folio edition there is a plate representing the mode of taking the ballot at Venice. Harrington advises every man that would study politics to understand Venice. He who understands Venice shall go nearest to judge, notwithstanding the difference there is in every policy, right of any government of the world. His leading maxim is that dominion follows the balance of property. The form of every government must be moulded in conformity with the mode in which property is distributed amongst all the members of the community. A just agrarian law must be established before the Republican form of government can be instituted. Without this preliminary measure, the political renovation of society cannot be secured. Because as to property producing empire it is required that it should have some certain root or foot-hold, which, except in land, it cannot have; being otherwise, as it were, upon the wing. Nevertheless in such cities as subsist mostly

[1] James Harrington, b. 1611, d. 1677. Works:—Toland, 1700, 1 vol. folio.

by trade, and have little or no land, as Holland and Genoa, the balance of treasure may be equal to that of land.

Harrington considered that the highest amount of property should be £2,000 per annum. His definition of a good government is—one established upon an equal agrarian scale, arising into the superstructure or three orders—the senate debating and proposing; the people resolving; and the magistracy executing by an equal rotation, through the suffrages of the people given by ballot.

An abridgment of the Oceana was published in 1659, under the title, the Art of Law-making. It is divided into three books,—the first, showing the foundation of all government; the second, on the Hebrew Commonwealth; the third, on Popular Government. Hume gives a very favourable critique when he says, "Harrington's Oceana was well adapted to that age, when the plans of imaginary republics were the daily subjects of debate and conversation; and even in our own time it is justly admired as a work of genius and invention."

Algernon Sidney[1] is better remembered as the chief of a great party and the martyr of a political cause, than as the author of the Discourses on Government. The work was written in reply to Sir Robert Filmer, and as a refutation of the Patriarchal Theory, and of the Divine Right of Kings.

5. Cumberland, 1632–1719.

De Legibus Naturæ Disquisitio Philosophica. London, 1672, 4to. Translated into English by Towers. Dublin, 1750. Traduit. Franc. Amsterdam, 1744, 4to.

Mr. Hallam has characterized the three different schools which in the third quarter of the seventeenth century cultivated the science of Ethics. The theologians went no further than Revelation, or the positive Law of God, for moral distinctions. The Platonic philo-

[1] B. 1617, beheaded 1683. Discourses upon Government: Toland, 1698–1704, fol.

sophers sought them in eternal and immutable relations. Hobbes and Spinosa reduced them to selfish prudence. Richard Cumberland, Bishop of Peterborough, may be reckoned the founder of a fourth school,—the Utilitarian school of modern times. Although Culverwell certainly anticipated him when he said in the framing of every law there ought to be an aiming of the common good.[1] His great work, "De Legibus Naturæ Disquisitio Philosophica," was published in 1672.[2] After briefly discussing former authors, he, upon diligent consideration of all those propositions which deserve to be ranked amongst the Laws of Nature, finds that they may be reduced to one universal law, from the just explication of which all the particular laws may be duly limited and illustrated. This general proposition may be briefly expressed:—"The endeavour to the utmost of our power of promoting the common good of the whole system of rational agents, conduces as far as in us lies to the good of every part,—in which our own happiness as that of a part is contained."[3]

Hobbes had maintained that the state of nature is a state of war of each against all; Cumberland's proposition is, that the state of nature with regard to man's actions, is a universal benevolence of each towards all. The general proof adduced by Cumberland in support of this proposition is, that the general prevalence of such a rule of action and of such dispositions tends in the highest degree to the happiness and well-being of all. But though Cumberland thus advances towards the doctrine of morals supported by modern jurists and divines, he nowhere supports his propositions by a reference to Revelation or to a future state.[4]

Grotius, Selden, and others had already investigated the Laws of Nature *à posteriori;* that is, by the testimony of authors and the consent of nations. Cumberland prefers at the outset to deduce the Laws of Nature

[1] Light of Nature, cap. iv. Brown's edition, p. 46.
[2] Translated by Rev. John Maxwell. London: Phillips, 1727.
[3] Introduction, sec. ix. Maxwell's Transl. p. 16. [4] Sec. xiv. p. 22.

as effects from the real causes in the constitution of Nature itself. The Platonic theory of innate moral ideas is not admitted by Cumberland. It is necessary to begin with what we learn by daily use and experience, assuming nothing but the physical laws of motion shown by mathematicians, and the derivation of all their operations from the will of a First Cause.[1]

These general moral Laws of Nature may be reduced to one, the pursuit of the common good of all rational agents, which tends to our own good as part of the whole; as its opposite tends not only to the misery of the whole system, but to our own.[2] This scheme may at first sight appear to want the two requisites of a law,—a legislator and a sanction. Nor is a sanction wanting in the rewards, that is, the happiness which attends the observance of the Law of Nature, and in the opposite effects of its neglect. In what Cumberland terms a lax sense, but which nevertheless is the true sense, the term sanction includes both rewards and punishments. A sanction is any thing which serves to bind.[3]

The common good, not any minute particle of it, as the benefit of a single man, is the great end of the legislator, and of him who obeys his will. Such human actions, as by their natural tendency promote the common good, may be naturally called good, more than those which tend only to the good of any one man;—as the whole is greater than its part. And whatever is directed in the shortest way to this end may be called right, as a right line is the shortest of all.[4]

In answer to the objection to the practice of virtue from the evils which fall on good men, and the success of the wicked, Cumberland remarks, that no good or evil is to be considered in this point of view, which arises from mere necessity or external causes, and not from our virtue or vice itself.[5] In this Cumberland made a near approach to the modern doctrine of the absolute independence of natural laws.

[1] De Legibus, Prolegomena. [2] Sec. 9.
[3] Sec. 14. [4] Sec. 16. [5] Sec. 20.

The happiness consequent upon virtue is a true sanction of natural law annexed to it by its author, and thus fulfilling the necessary conditions of its definition. And though some have laid less stress on these sanctions, and deemed virtue its own reward, and gratitude to God and man its best motive, yet the consent of nations and common experience show that the observance of the first end, which is the common good, will not be maintained without remuneration or penal consequences. By this single principle of common good the method of Natural Law is simplified; and its secondary propositions are arranged in such subordination as best conduces to the general end. Hence, moral rules give way in particular cases, when they come in collision with others of more extensive importance. For all ideas of right or virtue imply a relation to the system and nature of all rational beings. And the principles thus deduced as to moral conduct are generally applicable to political societies, which in their two leading institutions, the division of property and the coercive power of the magistrate, follow the steps of Natural Law, and adopt those rules of polity, because they perceive them to promote the common welfare.

Cumberland abstains from all intermixture of Scriptural authority; and appears in this respect to have been the first writer professing the Christian religion as a Protestant who sought to establish the principles of moral right independent of Revelation. Machiavelli had first introduced the method of argument in political matters without reference to Scripture. Cumberland, thus writing, is admitted to have made an era in the history of moral philosophy, as Puffendorff, whose great work was published in the same year with the "De Legibus," is considered similarly to have introduced the same system into legal philosophy. Even Hobbes, to whom Cumberland and Cudworth are so opposed, uses occasionally the arguments founded on Revelation. But, henceforth, in ethical and juridical treatises, the continual appeal is to experience, seldom to Scriptural authority.

It is very necessary to abridge considerably the statement of Cumberland's opinions. His prolonged arguments upon both sides of every question which has long since been summarily settled by the good sense of mankind, are most wearisome. This style is derived from the schoolmen: and it was, perhaps, difficult for Cumberland to emancipate himself from the influence of his clerical studies. Hobbes and Locke are almost totally free from the needless prolixities and endless logical divisions which encumber the pages of the Bishop of Peterborough.

Cumberland was "the only professed answerer of Hobbes." And we must now consider exactly what were the leading points of controversy between them. The question between Cumberland and the school of Hobbes is generally stated to be, whether certain propositions of immutable truth, directing the voluntary actions of man in choosing good and avoiding evil, and imposing an obligation upon them independently of civil laws, are necessarily suggested to the mind by the nature of things and the nature of mankind. The affirmative of this proposition Cumberland undertakes to prove from a consideration of the nature of both; from which many particular rules might be deduced, but above all that which comprehends all the rest and is the basis of his theory; namely, that the greatest possible benevolence of every rational agent towards all the rest constitutes the happiest condition of each and of all, so far as depends on their own power, and is necessarily required for their greatest happiness; whence the common good is the supreme law. It is easy to observe, by common experience, that we have the power of doing good to others, and that no men are so happy or so secure as they who most exert this. This Cumberland proves synthetically and to rigorous demonstration; although it is unnecessary to consider more than our own faculties of speech and language, the capacities of the head and countenance, the skill we possess in sciences and the useful arts, all which conduce to the social

life of mankind, and their mutual co-operation and benefit.[1]

Two corollaries of importance in the theory of ethics spring from a consideration of our physical powers. The first is, that inasmuch as they are limited by their nature we should never seek to trespass their bounds, but distinguish as the Stoics did τὰ ἐφ' ἡμῖν, from those beyond it, τὰ οὐκ ἐφ' ἡμῖν. The other is, that as all we can do in respect of others, and all the enjoyment we or they can have of particular things, is limited to certain persons, as well by space and time, we perceive the necessity of distribution, both as to things from which spring the rights of property, and as to persons by which our benevolence, though a general rule in itself, is practically directed towards individuals. Cumberland next shows the aptitude of mankind for the social virtues. These we have the power of knowing by our rational faculty, which is the judge of right and wrong, that is of what is conformable to the great law. And by the other faculties of the mind, as well as by the use of language, we generalize and reduce to propositions the determinations of reason. We have also the power of comparison and of perceiving analogies, by means of which we estimate degrees of good. Cumberland then urges against the unsocial theory of Hobbes, the observance of something like this general law of Nature by inferior animals, which rarely attack those of the same species, and in certain instances live together, as if by a compact for mutual aid; the contrivances in the human body, which seemed designed for the maintenance of society; the possession of speech; the efficiency of the hand, with several other arguments derived from anatomy.

Whatever conduces to the preservation of an intelligent being, or to the perfection of his powers, is defined by Cumberland to be natural good. It is of great importance to acquire a clear notion of what is truly good, —that is, of what serves most to the happiness and per-

[1] Ex. p. 482.

fection of every one; since all the secondary laws of nature,—that is, the rules of particular virtues,—derive their authority from this effect. A law of nature, meaning one subordinate to the great principle of benevolence, is defined by Cumberland to be a proposition manifested by the nature of things to the mind according to the will of the First Cause, and pointing out an action tending to the good of rational beings, from the performance of which an adequate reward, or from the neglect of which a punishment, will ensue by the nature of such rational beings. This definition is proved at extreme length in the fifth chapter, to which portion of the "De Legibus" Mr. Hallam remarks both Paley and Butler are much indebted. Natural obligation he defines thus: "No other necessity determines the will to act than that of avoiding evil, and of seeking good, so far as appears to be in our power:"—Non alia necessitas voluntatem ad agendum determinat, quam malum in quantum tale esse nobis constat fugiendi, bonumque quatenus nobis apparet prosequendi.[1]

After having established the primary law of universal benevolence, Cumberland next deduces the chief secondary principles which are called the moral virtues. He gives the first place to Justice; but is far from comprehending the true meaning of the term. Justice, in the scientific sense of the term, includes only those duties which are capable of being enforced by the public authority: Cumberland, however, includes under Justice the social duties of liberality, courtesy, and domestic affection. These sentiments, however, based upon a delicacy of feeling abhorrent of compulsion, can never be enforced by law. The ancient philosophers, and even the modern jurists until the eighteenth century, included under Justice almost the whole sphere of human action; and the principal source of the confusion which has arisen in the science of Jurisprudence amongst its cultivators has proceeded from not distinguishing at the outset between ethics and compulsory law.

[1] Cap. 5, sec. 7.

The good of all rational beings is a complex whole, being nothing but the aggregate of good enjoyed by each. We can only act in our proper sphere, labouring to do good. But this labour will be fruitless, or mischievous, if we do not keep in mind the higher gradations which terminate in universal benevolence. No man should seek his own advantage otherwise than that of his family permits; or provide for his family to the detriment of his country, or promote the good of his country at the expense of mankind. Cumberland, in these sentiments, approaches the level of modern cosmopolitanism. In the development of society, the abnegation of self, and the devotion to the interests of others, become more extolled. Hence arises the praise of patriotism. But as yet the sense of mankind has not been developed into universal philanthropy, nor are the interests of other nations regarded in comparison with our own. In time, however, the word National will become like the term Provincial, an expression rather of reproach than of praise.

These are the principal portions of the treatise "De Legibus Naturæ," which relate to Jurisprudence. Mr. Hallam has remarked that, "as Taylor's 'Doctor Dubitantium' is nearly the last of a declining school, Cumberland's 'Law of Nature' may be justly considered as the herald, especially in England, of a new ethical philosophy; of which the main characteristics were, first, that it professed to stand complete in itself, without the aid of Revelation; secondly, that it appealed to no authority of earlier writers whatever, though it sometimes used them in illustration; thirdly, that it availed itself of observation and experience, alleging them generally, but abstaining from particular instances of either, and making, above all, no display of erudition; and fourthly, that it entered very little upon casuistry, leaving the application of principles to the reader.'

6. John Locke, 1632-1704.

Works: An Essay concerning the Human Understanding. London, 1670, fol. many editions. The Works of John Locke, 1714. 3 vols. fol. London; 10 vols. 8vo, London, 1812.

John Locke was born at Wrington, near Bristol, in Somersetshire, in the year 1632—in which same year also Spinosa, Puffendorf, and Cumberland were born. His father, originally a clerk to a justice of the peace, served on the parliamentary side during the civil war, and was promoted to a captaincy. After the restoration of Charles II. he practised as an attorney. By the interest of Colonel Popham, under whom his father had served, the young Locke was admitted a scholar at Westminster, and thence proceeded to Christchurch, Oxford. He took the degree of A.B. in 1655; of A.M. in 1658. After this we find him applying to the study of medicine, not so much with the perseverance required to insure practical success, as rather for the benefit of his own delicate constitution. In 1664 he, as secretary, accompanied Sir William Swan in his embassy to Brandenburgh. Returning to England within the year, he applied himself again to his studies, particularly to natural philosophy. In 1666 he became accidentally acquainted with Lord Ashley, afterwards Earl of Shaftesbury; Mr. Locke attended him medically, and saved his life by opening an abscess in his side. After this Lord Ashley became his most constant friend, introduced him to the first men of the day, and finally retained Mr. Locke living in his house as tutor to his only son. As Hobbes had been the tutor of two successive Earls of Devonshire, so Locke was the tutor of two successive Earls of Shaftesbury. The eldest son of his noble pupil was afterwards educated by him, and the author of the "Characteristics" had no reason to blush for his master. About 1670 Locke began to form the plan of his celebrated "Essay on the Human Understanding." But we may suppose that its rapid progress was somewhat interrupted, first by the increased business entailed upon

him when his patron, Lord Ashley, was created Earl of Shaftesbury and Lord Chancellor of England in 1672, and next when he shared in his disgrace. In 1675 Mr. Locke went to France; and from that time, with the exception of a brief sojourn in London during the temporary restoration of Lord Shaftesbury to favour in 1679, he remained abroad until the revolution of 1688. He was joined entirely with the revolutionary party; nor did those in power at home neglect to show their sense of his importance. In 1684 he was deprived of his studentship in Christchurch; and in 1685, when the Duke of Monmouth was preparing for his rebellion, the English envoy at the Hague had orders to demand Mr. Locke and eighty-three other persons to be delivered up by the States General; upon which he lay concealed for a year. Whilst thus in hiding he wrote the Essay on Toleration, at first published in Latin. As with Grotius, his exile gave to Locke leisure for the great work, the Essay on the Human Understanding; and upon which he had been engaged for upwards of seventeen years. He returned to England in 1688, in the same fleet which conveyed the Princess of Orange. Restored now to his country, and with full liberty to pursue his favourite studies, in 1689 he published his Essay on the Human Understanding; and in the same year his two treatises on Government. In these he fully vindicated the principles upon which the revolution had been conducted. The remainder of his life he passed in the studies he loved so well, and in the society of the learned and great, only troubled by his weak health, and the controversies his opinions on some subjects excited. He died on the 28th of October, 1704, in the seventy-third year of his age.

Whatever opinion may be now held as to the value of metaphysical science, and of the contributions made to it by Locke, there can be no question as to the great services which his treatises on Government, Toleration, and Education have rendered to mankind.

In the Essay on the Human Understanding, Law is

divided by Locke into the Divine Law, the Civil Law, and the Law of Opinion or Reputation. By the relation men's actions bear to the first of these, men judge whether such actions be sins or duties; by the second, whether they be criminal or innocent; and by the third, whether they be virtues or vices.[1]

By the Divine Law Locke understands that which God has set to the actions of men, whether promulgated to them by the light of nature or the voice of revelation. The Civil Law is the rule set by the commonwealth to the actions of those who belong to it. As to the Law of Opinion, the names virtue and vice, in the particular instances of their application through the several nations and societies of men in the world, are constantly attributed only to such actions as in each country and society are in reputation and discredit. The measure of virtue and vice is the approbation or dislike, praise or blame, which by a secret and tacit consent establishes itself in the several societies, tribes, and clubs of men in the world, whereby several actions come to find credit or disgrace amongst them, according to the judgment, maxims, or fashion of that place. The greatest part of mankind govern themselves chiefly, if not solely, by this law of fashion; and so they do that which keeps them in reputation with their company, little regard the laws of God or the magistrate. The penalties that attend the breach of God's laws most men seldom seriously reflect on; and amongst those that do, many, whilst they break the law, entertain thoughts of future reconciliation, and making their peace for such breaches. As to the punishment due from the laws of the commonwealth, they frequently flatter themselves with the hope of impunity. But no man escapes the punishment of their censure and dislike who offends against the fashion and opinion of the company he keeps and would recommend himself to. He must be of a strange and unusual constitution, who can content himself to live in constant disgrace and disrepute with his own particular society. Solitude many

[1] Essay on Human Understanding, b. ii. c. 28, s. 7.

men have sought, but no man can live in society under the constant dislike and ill opinion of his familiars. This is a burden too heavy for human sufferance; and he must be made up of irreconcilable contradictions, who can take pleasure in company, and yet be insensible of contempt and disgrace from his companions.[1]

These laws then—first, the law of God; secondly, the law of political society; thirdly, the law of fashion, or private censure—are those to which men variously compare their actions; and it is by their conformity to one of these laws that they take their measures, when they would judge of their moral rectitude, and denominate their actions good or bad. Morality is the relation of actions to those rules. Whether we take the rule from the fashion of the country or the will of a lawgiver, the mind is easily able to observe the relation any action has to it, and to judge whether the action agrees or disagrees with the rule; so the mind has a notion of moral goodness or evil, which is either conformity or not conformity of any action to that rule, and therefore is often called moral rectitude. This rule being nothing but a collection of several simple ideas, the conformity thereto is but so ordering the action, that the simple ideas belonging to it may correspond to those which the law requires. And thus we see how moral beings and notions are founded on, and terminated in, those simple ideas we have received from sensation or reflection. For example, if we examine the complex idea signified by the word murder, when we have taken it asunder and examined all the particulars, we shall find them to amount to a collection of simple ideas derived from reflection or sensation; first, from reflection on the operations of our own minds, we have the ideas of willing, considering, purposing beforehand, malice, or wishing ill to another; and also of life, or perception, and self-motion—secondly, from sensation we have the collection of those simple sensible ideas which are to be found in a man, and of some action whereby we put an end to perception and

[1] B. ii. c. 28, s. 12.

motion in the man; all which simple ideas are comprehended in the word murder. This collection of simple ideas being found to agree or disagree with the esteem of the country, and to be held by most men there worthy of praise or blame, is called virtuous or vicious; if the will of a supreme invisible lawgiver be the rule, it is called good or evil, sin or duty; and if it be compared to the civil law, it is called lawful or unlawful, crime or no crime. So that whencesoever we take the rule of moral action, or by what standard soever we frame in our minds the ideas of virtues or vices, they consist only and are made up of collections of simple ideas, which we originally received from sense or reflection, and their rectitude or obliquity consists in the agreement or disagreement with those patterns prescribed by some law. Thus the challenging and fighting with a man, as it is a particular sort of action, by particular ideas distinguished from all others, is called duelling: which, when considered in relation to the law of God, will deserve the name of sin; to the law of fashion in some countries, valour and virtue; and to the municipal laws of some governments, a capital crime.[1]

The two treatises on Government are distinct and separate: in the former, according to the title, "the false principles and foundations of Sir Robert Filmer and his followers are detected and overthrown; the latter is an essay concerning the true original extent and end of civil government." Filmer's argument was, that the early kings were fathers of families, and became invested with political power by reason of this social connexion. This patriarchal power continued not only till the flood, but after it. The three sons of Noah had the whole world divided among them by their parent, with the benediction, "Be fruitful, and multiply, and replenish the earth." Most nations have referred their origin to some one of the family of Noah, who were scattered abroad after the destruction of the Tower of Babel. In this dispersion is the germ of every kind of regal power which has

[1] B. ii. c. xxviii. ss. 13–15.

prevailed throughout the world. Such was Filmer's theory. In the preface to the treatises on government, Locke expresses the hope that the propositions advanced are sufficient to establish the throne of King William; to make good his title in the consent of the people; and to justify to the world the people of England, "whose love of their just and natural rights, with their resolution to preserve them, saved the nation when it was on the very brink of slavery and ruin."

Certainly, Sir Robert Filmer,[1] by provoking such a reply, has done good service to mankind. Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that it was hardly to be conceived that an Englishman, much less a gentleman, should plead for it. Yet Sir Robert Filmer has done this, and his system lies in a little compass. It is no more but that all government is absolute monarchy, and that no man is born free. We may in the nineteenth century omit the learned arguments as to Adam's title to sovereignty by creation or by donation.[2] The theory of divine right had not been successful in England. The two Revolutions of 1649 and 1688 had sufficiently roused the minds of men against it. These great political convulsions inspired numerous bold spirits to write against the divine right of kings. Hobbes, Milton, Harrington, Algernon Sidney, and Locke, appear on the one side; Sir Robert Filmer on the other. Filmer, now forgotten, has had the honour of being refuted by Sidney and Locke. His doctrine was that political power had its origin in Adam; the first man must have been the first sovereign; power must hence have been transmitted hereditarily from generation to generation, and is divided amongst the different kings of the earth, who must be considered as

[1] B. 1620, d. 1688. Works—"The Freeholders' Grand Inquest;" "Reflections concerning the Original of Government;" "The Anarchy of a Limited Monarchy," 1646; "Advertisement to the Young Men of England touching the difference between an English and a Hebrew Witch." London, 1679. "Patriarcha," 1680.

[2] Locke on Government, b. i. c. iii. iv.

the successors of Adam and Noah. This fiction of Filmer's, ridiculous as it may appear to us, is, nevertheless, at the bottom of every monarchical doctrine which does not rest on the consent of the people.

The treatise of Locke is concise and clear. He shows that the true state of man is the social state. He founds the right of Property on Labour, a manifestation of human personality which transmits its fruits by inheritance to those who come after us. Paternal Power, the basis of the family, is separated from Political Government. Locke shows in the first book of the "Treatise on Civil Government," that Adam had not, either by natural right of fatherhood or by positive donation from God, any such authority over his children or dominion over the world, as is pretended by Filmer and his followers; next, that if he had, his heirs yet had no right to it; again, that even if his heirs had, there being no law of Nature nor positive law of God that determines which is the right heir in all cases that may arise, the right of succession, and consequently of having rule, could not have been certainly determined; and lastly, that even if that had been determined, yet the knowledge of which is the eldest line of Adam's posterity has been so long utterly lost, that in the races of mankind and families of the world there remains not to one above another the least pretence to be the eldest house, and to have the right of inheritance. And these premises being laid down, Locke considers it impossible that the rulers now on earth should make any benefit, or derive the least shadow of authority, from that which is held to be the fountain of all power,—"Adam's private dominion and paternal jurisdiction." Therefore he that will not give just occasion to think that all government in the world is the product only of force and violence, and that men live together by no other rules but that of beasts, where the strongest carries it, must confess that there must be of necessity found out another rise of government, another origin of political power. Political power is then defined by Locke to be the right of making laws with penal-

ties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defence of the commonwealth from foreign injury; and all this only for the public good.[1]

The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of Nature for his rule. The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative power shall enact according to the trust put in it. Freedom, then, is not what Sir Robert Filmer tells us, "a liberty for every one to do what he lists, to live as he pleases, and not to be tried by any laws," but freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, arbitrary will of another man, as freedom of nature is to be under no other restraint but the law of Nature.[2]

This freedom from absolute arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it, but by what forfeits his preservation and his life together; for a man not having the power of his own life cannot by compact or his own consent enslave himself to any one, nor put himself under the absolute arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself, and he that cannot take away his own life, cannot give another power over it.[3]

The perfect condition of slavery is nothing else but the state of war continual between a lawful conqueror and a captive; for if once compact enter between them and make an agreement for a limited power on one side and obedience on the other, the state of war and slavery

[1] B. ii. c. i. [2] C. iv. s. 22. [3] C. iv. s. 23.

ceases as long as the compact endures; for, as has been said, no man can by agreement pass over to another that which he hath not in himself—a power over his own life.[1]

Locke advocates the doctrine of a negative community of things, and deduces the title to all property from labour. Though the earth originally and all inferior creatures were common to all men, yet every man has a property in his own person. The labour of his hands and the work of his hands are properly his. Whatsoever then he removes out of the state that nature has provided he has mixed his labour with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature has placed it in, it has by this labour something annexed to it which excludes the common right of other men. For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least, where there is enough and as good left in common for others.[2]

The right of appropriation is founded both on Natural Reason and the Divine Law. God gave the world to man in common; but since he gave it them for their benefit and the greatest conveniences of life they were capable to draw from it, it cannot be supposed He meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, not to the fancy or covetousness of the quarrelsome and contentious.[3]

Locke's argument on the right of appropriation grounded upon the fact of the same plenty having been left to those who in the early ages of the world would employ the same industry, cannot be supported. Nor is it enough to lay down labour as the sole primary title to property. Occupancy must always have preceded labour; as a chattel must always have been at least possessed before personal exertion could have been expended on it. He is, however, right in calling atten-

[1] C. iv. s. 24. [2] C. v. s. 27. [3] C. v. s. 34.

tion to the fact that the man who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind. For the provisions tending to the support of human life, produced by one acre of enclosed and cultivated land, are far more than those which are yielded by an acre of land of an equal richness lying waste and common.[1]

The sixth chapter of the Treatise on Governments discusses the paternal power. Though Locke had laid down before that all men by nature are equal, he did not intend all sorts of equality: age or virtue may give men a just precedency; excellency of parts and merit may place others above the common level. Birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude, or other respects, may have made it due; yet all this consists with the equality which all men possess in respect of jurisdiction or dominion one over another; that equality being the equal right which every man has to his natural freedom, without being subject to the will or authority of any other man.[2]

The power which parents have over their children arises from that duty which is incumbent on them to take care of their offspring during the imperfect state of childhood. But, though the father's power of commanding extends no farther than the minority of his children, and to a degree only fit for the discipline and government of that age, and though that honour and respect, and all which the Latins called piety, which they indispensably owe to their parents all their lifetime and in all estates,—with all that support and deference which is due to them,—gives the father no power of governing; yet it is obvious to conceive how easy it was in the first ages of the world, and in places still where the thinness of people gives families leave to separate into unpossessed quarters, for the father of the family to become the prince of it. The natural fathers of families, by insensible change, became also their political monarchs; and, as

[1] C. v. s. 37. [2] C. v. s. 54.

they chanced to live long, and leave able and worthy heirs for several successions or otherwise, so they laid the foundations of hereditary or elective kingdoms under several constitutions and manners, according as chance or contrivance happened to mould them.[1]

In the next chapter Locke discusses the rights between husband and wife, parent and child, master and servant, upon principles now generally recognised, and which it is unnecessary to detail.

In the eighth chapter of the Treatise on Civil Government the beginning of political societies is considered. Locke founds this on consent,—the doctrine afterwards expanded by Rousseau in his Contrat Social. Man, being by nature free and equal, no one can be subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community for their safe living in a secure enjoyment of their properties. This any number of men may do; because it does not injure the freedom of the rest. And thus what actually begins and constitutes any political society is nothing but the consent of any number of freemen capable of a majority, to unite and incorporate into such a society.[2]

Locke then discusses the objections to this doctrine, of which the main objection is, that there are no instances to be found in history, of a company of men independent and equal amongst themselves that met together, and in this way began and set up a government. His answer to this objection is, that government is everywhere antecedent to records, and letters seldom come in amongst a people till a long continuation of civil society has, by other more necessary acts, provided for their safety, ease, and plenty; and then they begin to look after the history of their founders, and search into their original after they have outlived the memory of it. But Locke does not notice the principal objection, that the doctrine of such

[1] Civil Government, c. vi. s. 76. [2] C. viii. ss. 95–99.

a compact presupposes an already existing consciousness of a state, and a form of law amongst a people. In history, also, the earliest records of governments are those of chieftains ruling by force, not at all by consent of the governed.

The chief end of men's uniting into commonwealths is the preservation of their property. Locke states admirably the things wanting to this in the state of nature. First, there is wanting an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them; for, though the Law of Nature be plain and intelligible to all rational creatures, yet men, being biassed by their interest as well as ignorant for want of studying it, are not apt to allow of it as a law binding to them in the application of it to their particular cases. Secondly, in the state of nature there is wanting a known and indifferent judge, with authority to determine all differences according to the established law; for every one in that state being both judge and executioner of the Law of Nature, men being partial to themselves, passion and revenge are apt to carry them too far in their own cases, as well as negligence and unconcernedness to make them too remiss in other men's. Thirdly, in the state of nature there often is wanting power to back and support the sentence when right, and to give it due execution.[1]

Man in the state of nature has two powers. The first is to do whatsoever he thinks fit for the preservation of himself and others within the permission of the Law of Nature; by which law, common to them all, he and all the rest of mankind are one community distinct from all other creatures; the other is to punish the crimes committed against that law. The first power he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of the society shall require: the power of punishing he wholly gives up, and engages his natural force which he might

[1] C. ix. ss. 124–126.

before employ in the execution of the Law of Nature by his own single authority, as he thought fit to assist the executive power of the society, as the law thereof shall require.[1]

Locke is erroneous in considering the establishment of the legislative power as the first and fundamental positive law of all communities. The judicial power is prior in point of time; as disputes must always have arisen before the necessity was perceived of settling them definitively by a legislative Act; and the Common Law proceeding from that common consciousness of the people of which custom is the recognisable sign, must always have preceded statutable legislation.

The legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it. Locke divides the executive power into two portions,—one, the executive power properly so called, which sees to the execution of the laws that are made; —the other federative, which contains the power of war and peace, leagues and alliances, and all the transactions with all persons outside of the commonwealth.[2]

After discussing conquest, usurpation, and tyranny, Locke considers the question of the dissolution of government in a chapter which manifestly alludes to the Revolution of 1688. Governments are dissolved when the Legislature or the Prince act contrary to their trust. But revolutions of this kind do not happen upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be borne by the people without mutiny and murmur. But, if a long train of abuses, persecutions, and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going—it is not to be wondered that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them

[1] C. ix. ss. 129, 130. [2] C. xii. ss. 145, 146.

the ends for which government was at first erected, and without which ancient names and specious forms are so far from being better that they are much worse than the state of nature or pure anarchy; the inconveniences being all as great and as near, but the remedy further off and more difficult.[1]

This doctrine of a power in the people of providing for their safety anew by a new legislature, when their legislators have acted contrary to their trust by invading their property, is the best fence against rebellion, and the most probable means to hinder it; for rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government; those, whoever they may be, who by force break through, and by force justify their violation of them, are truly and properly rebels; for, when men, by entering into society and civil government, have excluded force, and introduced laws for the preservation of property, peace, and unity amongst themselves: those who set up force again in opposition to the laws do *rebellare;* that is, bring back again the state of war, and are properly rebels.[2]

As to the common question, "Who shall be judge?" Locke replies, the people shall be judge; for who should be judge whether his trustee or deputy acts well, and according to the trust reposed in him, but he who deputes him, and must, by having deputed him, have still a power to discard him when he fails in his trust. And further, this question, who shall be judge, cannot mean that there is no judge at all; for, where there is no judicature on earth to decide controversies among men, God in heaven is Judge. He alone, it is true, is Judge of the right. But every man is judge for himself, as in all other cases, so in this, whether another hath put himself into a state of war with him.[3]

[1] Sec. 225. [2] Sec. 226. [3] Sec. 241.

CHAPTER III.

THE GERMAN SCHOOL OF JURISPRUDENCE.

1. Puffendorf, 1632–1694.

Works:—Sam. Puffendorf Elementa Jurisprudentiæ Universalis: *Hag. Com.* 1660; *Jen.* 8vo. De Jure Naturæ et Gentium libb. viii.: Lund. 1672; Francof. 1684, 4to; cum notis Hertii, Barbeyraci, et Mascovii, Francof. et Lips. 1744, 1749, 2 vols. 4to; translated into English by Basil Kennett, folio, 1729 and 1749. De Officio Hominis et Civis libb. ii.: Lund. 1673; cum notis variorum, Lugd. Bat. 1769, 2 vols. 8vo.

Authorities:—Wheaton's History of the Law of Nations: New York, 1845; Reddie's Inquiries in International Law: Edinburgh, Blackwood, 1842; Bayle: Dictionaire.

The German School may be said to commence with Puffendorf. It has lasted in an unbroken series of Professors at the Universities down to our times. Samuel Baron von Puffendorf was born in 1632. He was educated at the University of Jena, where he studied the Cartesian philosophy. In 1661, he was appointed Professor of the Law of Nature and Nations, at Heidelberg, and afterwards at Lund. He died in 1694, at Berlin. He discussed Natural Law as a separate question, independent of the obligations of Revealed Religion or positive Civil Law. His works are,—"Elementa Jurisprudentiæ Universalis;" "De Jure Naturæ et Gentium;" "De Officio Hominis et Civis." He promulgated the principle of Sociability which Grotius had started. The edition of Puffendorf "De Legibus Naturæ" which I have before me is a heavy folio of 900 pages, closely printed in double columns, "done into English by Basil Kennett, D.D., late President of Corpus Christi College, in Oxford," the third edition published in London in 1717. I have conscientiously read a great portion of it. I cannot say I have derived much benefit from the task. I must admire the learning and industry of both author and translator; but here my praise must stop short. I must agree with Leibnitz that Puffendorf was "vir parum jurisconsultus et minimè philosophus." The ponderous disquisitions

upon the origin and variety of moral entities, the quantity and imputation of moral actions, the right and privilege of necessity—these discussions in the introductory part of the work, which professes to be purely scientific, are no longer of use; whilst the chapters on Occupancy, Covenants, and the other details of Law, are merely compilations from the Roman Civil Law, stripped of the Roman characteristics. The treatise is divided into eight books; but it is far from our purpose to give more than a few quotations from them. The first draft of the work was published in the year 1660, under the title of "Elements of Jurisprudence." The labour of twelve subsequent years was expended in bringing it to the form in which, at present, it exists in our libraries. In that labour our author was not content to have drawn together all assistance from the stores of morality, politics, and law, but, following the example of his great predecessor Grotius, he engaged himself on a longer and wider search; running through the whole circle of philological authors, ancient and modern, and disposing under the heads of his work the most remote examples and illustrations. Hence, every page is loaded, not only with numerous citations, but also with disorderly marks of addition, reference, and comparison.

During the period between Grotius and Puffendorf, Germany produced no writer who contributed much to the advancement of the Law of Nations. Spinosa,[1] in his Tractatus Theologico-Politicus, had endeavoured to destroy the previous theories, both as to the Law of Nature and the Law of Nations. The method employed by Grotius had been obviously defective. Puffendorf attempted to remedy the defect and improve the arrangement. But although a very learned man, he had not the extended views or the grasp of intellect which characterized Grotius. From his age, down to the time of Puffendorf, the Law of Nations had been cultivated as a separate science. But Puffendorf held that the Law of Nations is solely the Law of Nature applied to Nations.

[1] Spinosa, b. 1632, d. 1677.

Although correct in holding that the transactions between nations are, in cases of dispute, to be decided by the same juridical rules of right as disputes between individuals, still Puffendorf, by denying the place of a separate science to International Law, effectually, for a time, checked its cultivation.

Puffendorf, by his theory, impeded the progress of International Law. He did not perceive the distinction between justice and the other virtues that it is susceptible of enforcement; and he confounds ethics with positive law. The foundation of the system of Puffendorf is embarrassed with metaphysical subtleties. Moral entities are defined to be modes superadded to natural things and motions by understanding beings, chiefly for the guiding and tempering the freedom of voluntary actions, and for the procuring of a decent regularity in the method of life. Puffendorf terms them "modes," because he conceives Being in general to be more conveniently divided at large into Substance and Mode, than into Substance and Accident. Moral entities are of this kind, the original of which is justly to be referred to Almighty God, who would not that men should pass their life like beasts, without culture and without rule, but that they and their actions should be moderated by sundry maxims and principles, which could not be effected without the application of such terms and notions. Hence, the end of them is plainly to be discovered, which is not like that of natural beings, the perfection of the universe, but the particular perfection of human conduct.[1]

The second chapter is on the "Certainty of Moral Science." It had been an established persuasion amongst the generality of learned men, that moral knowledge is destitute of that certainty which is found especially in mathematics. The foundation of this notion has been, that they have taken morality to be incapable of demonstration, from whence only true science, free from the fear of error, can proceed; and they imagine that all its evidence rises no higher than a probable opinion. Aris-

[1] Book i. chap. 1, sec. 3.

totle has contributed not a little to this, when he said that honesty and justice have so many different faces, and are liable to so many mistakes, that they seem to be only instituted by law, and not originally decreed by nature.[1]

Puffendorf does not assent to the doctrine of some writers, that there are several things honest, or dishonest, of themselves. He argues that dishonesty and turpitude are affections of human deeds, arising from their agreeableness, or disagreeableness, to a rule or a law; and since a law is the command of a superior, he does not understand how we can conceive any goodness, or turpitude, before all law, and without the imposition of a superior; and he considers that those who would establish an eternal rule for the morality of actions, without respect to the divine injunction and constitution, join with God some coeval extrinsical principle, which he was obliged to follow in assigning the forms and essences of things. God created man according to his own free will; how then should it come to pass that the actions of mankind should be vested with any affection or quality proceeding from intrinsical and absolute necessity, without regard to the institution and pleasure of the Creator?[2]

In the first book diffused chapters[3] follow upon the understanding of man, as it concurs to moral actions; and upon the qualities, estimation, and imputation of moral actions.

The second book starts with the proposition, that it is not agreeable to the nature of man to live without laws. He then attempts to discuss the natural state of man, abstracted from all the rules and institutions, whether of human invention or of the suggestion and revelation of Heaven. By this wide exemption are excluded not only all the various arts and improvements, and the universal culture of life, but especially civil conjunctions and societies; by the introducing of which, mankind was

[1] Book i. chap. 2, sec. 1. [2] Book i. chap. 2, sec. 6.
[3] Book i. chaps. 3–9.

first brought under the decent management of order and regularity.[1]

This natural state of man may be imagined in theory, but is one in which we never have found historically any portion of the human race, and is one which, for practical purposes, it is wholly unnecessary to consider.

The theory of Hobbes is next discussed; whether this alleged natural state in regard to other men bears the semblance of war and peace. Hobbes says, "Every man is an enemy to every man, whom he neither serves nor obeys;"[2] and again, "The state of commonwealth amongst themselves is natural, that is, hostile; and though they cease to fight, yet this intermission must not be called a peace, but a breathing-time, during which each enemy, observing the motions and the countenance of the other, rates his security, not by covenant, but by the strength and the designs of his adversary." After discussing this opinion, Puffendorf ends by admitting that the desire of peace is too weak and uncertain a security for its preservation amongst mankind.[3]

Since, then, it is inconsistent with the nature and the condition of man that he should live entirely loose from law, or that he should perform his actions by a wild and wandering impulse, without regard to any standard, it follows that inquiry should be made into that universal rule of human action to which every man is obliged to conform, as he is a reasonable creature. The law of nature does not depend upon the consent of nations, but the principles of right are to be discovered by natural reason. The dictates of right reason are true principles, which agree with the nature of things, well observed and examined. And the true original of the law of nature is derived from the condition of man.[4]

Man is an animal desirous of his own preservation, exposed to many wants, unable to secure his own safety and maintenance without assistance, and capable of returning kindness by the furtherance of mutual good; but he

[1] Book ii. chap. 2, sec. 1.
[2] De Cive, chap. 9, sec. 3.
[3] Book ii. chap. 2.
[4] Book ii. chap. 3, secs. 13, 14.

is as powerful in effecting mischief as he is ready in designing it. Now, that such a creature may be preserved and supported, and may enjoy the good things attending his condition of life, it is necessary that he be social. This, then, will appear a fundamental law of nature; that every man ought, as far as in him lies, to promote and preserve a peaceable sociability with others, agreeable to the end and disposition of the human race. By the term Sociability, Puffendorf implies such a disposition of one man towards all others as shall suppose him united to them by benevolence, by peace, and by charity.[1]

Reason is not the law of nature itself, but the means upon a right application of which that law is to be discovered.[2]

Puffendorf discusses the proposition, whether the law of nations be distinct from the law of nature. Hobbes divided natural law into the natural law of men, and the natural law of states, commonly called "the law of nations." He observed that the precepts of both are the same, but that, forasmuch as states, when they are once instituted, assume the personal proprieties of men, hence it comes to pass that what we term the law of nature when speaking of the duty of particular men, we term the law of nations when we apply it to whole states, nations, or peoples: with this opinion Puffendorf coincides.

The best division of natural law, is into duties towards ourselves and towards others. Self-defence is discussed with needless prolixity; yet it is important as the first principle from which springs the right of public punishment, and the right of the state to exercise the public force, and the public government, for the preservation of all.[3] Chapters follow upon the rights and privileges of necessity, and upon the measure of damages where injury is done: in these details much is borrowed from the Roman law.

The second chapter of the third book is upon "the Natural Equality of Mankind." Besides that affection

[1] Book ii. chap. 3, sec. 15. [2] Sec. 20. [3] Book ii. chap. 5.

which every man maintains for his own life, and body, and possessions, by which he cannot but resist, and repel, whatever threatens destruction to those dear concerns; we may discover likewise, deeply rooted in his mind, a most tender esteem and value for himself, which if any one endeavour to impair, he is seldom less, and sometimes much more, incensed, than if a mischief had been offered to his person, or to his estate. This passion is in the very constitution of human nature. The word "man" is thought to carry dignity in its sound, and is commonly resorted to as the last argument against an insult. Under natural equality, how much soever a man may surpass his neighbours as to bodily or intellectual endowments, he is still obliged to pay all natural duties.[1]

Puffendorf then discusses the common duties of humanity;[2]—the duty of keeping faith, and the diversity of obligations to it;[3]—the nature of promises and covenants in general;[4]—the consent required in making promises and covenants;[5]—the matter of promises and covenants, and their conditions.[6] Promises are divided into perfect and imperfect. Imperfect promises, or *nuda pacta*, seem to be obligatory, by the rules of veracity, and for the sake of maintaining confidence amongst men, rather than in strict justice. Promises are invalidated by error; and fraud in either party annuls a contract, at the option of the other.

The fourth book commences with a disquisition on the use and origin of speech; and it then proceeds to the obligation which attends speech. A lie is a violation of a right, which Puffendorf derives from a tacit contract amongst mankind that words, or signs of intention, shall be used in a definite sense which others may understand.

The second chapter of the fourth book is on the sanctity of an oath. An oath is a religious asseveration by which we either renounce the mercy or imprecate the vengeance of Heaven, if we speak not the truth.[7] An

[1] Book iii. chap. 2. [2] Chap. 3. [3] Chap. 4. [4] Chap. 5.
[5] Chap. 6. [6] Chaps. 7, 8. [7] Book iv. chap. 2, secs. 1–4.

oath must be taken only in the name of God, and according to the religion of him that swears. Since in promises, consent grounded upon mistake is not effectual towards producing an obligation, therefore an oath is not binding, in case it be evidently made out that the person who swore supposed some matter to be otherwise than it really proves to be, and which if he had not supposed, he would not have taken the oath; but oaths obtained by deceit or fear, or to perform things unlawful, are not binding.[1]

The constitution of man is such that it cannot be preserved by its own internal substance, but needs continually to take in the assistance of certain things from without, as well for its nourishment and support, as for its defence against those many enemies which seek to ruin and dissolve its frame.

Puffendorf then enters into the question of destroying living creatures for the purposes of food, and justifies it on the following singular argument. No mutual right or obligation passes between men and brutes, nor ought to pass by the direction of nature; for we neither find that the law of nature, by virtue of its absolute authority, commands us to maintain friendship and society with brutes, nor are they capable of sustaining any obligation towards men arising from covenant. From which defect of all common right there arises, as it were, a state of war between those who both are able to hurt each other, and upon probable grounds are supposed to be willing.

Puffendorf next treats of the origin of property. Property is defined as a right, by which the very substance of a thing so belongs to one person that it doth not in whole belong after the same manner to any other: property proceeds immediately from an agreement amongst men. There are two qualifications necessary to make the object capable of dominion or property.[2] First, that it be able to afford some use to men; secondly, that it be some way so far under the power of men,

[1] Book iv. chap. 2, secs. 7–9. [2] Chap. 5, sec. 1.

as that they may fasten on it, and keep it for their occasions. The questions about things which are consumed by their use, about property on the sea, and how far the navigation of the sea should be free, are next considered.[1]

The methods of acquiring property may be conveniently divided into original and derivative;—the former are those by which the property of any thing was first introduced, the latter are those by which a property already settled passes from one man to another. The original method of acquiring property is occupancy.[2]

The following chapters upon rights over other men's property, upon the transfer of property, upon wills and testaments, upon successions to persons who die intestate, and upon prescription, are open to the critiques usually passed upon the jurists of the Middle Ages,—that their works consist of mere extracts from the Roman law, stripped of its details. Thus of the fifth book, which is mainly conversant with contracts, it may be said that the greater portion of it is extracted from the Pandects, and a great portion of the substance of it necessarily occupies a place in the text-books upon contracts in all civilized countries.

In the sixth book, chapters on Matrimony, on the Paternal Power, and on the Relation of Master and Servant, follow.

The seventh book treats of Government. The true and leading cause why the fathers of families would consent to resign up their natural liberty and to form a commonwealth, was thereby to guard themselves against those injuries which one man was in danger of sustaining from another; for as nothing next to Almighty God can be more beneficial to man than man himself, so nothing is able to work him greater mischief. And for redress of those evils which men, at the suggestion of depraved nature, delight to bring upon each other, they had recourse to themselves as the surest defence, by joining together in one body, and erecting a

[1] Book iv. chap. 5, secs. 1–10. [2] Chap. 6, secs. 1–14.

civil society. Sovereignty is the result of those covenants by which the public body was first united.[1]

The following chapters on the Form of Government, the Duties and Power of the Sovereign, are scarcely of any importance at the present day. The concluding chapters of this immense dissertation are upon the Right of War, Treaties, Compacts of Sovereigns, and the Changes and Dissolution of the Commonwealth.

Grotius has derived the origin of government from the natural sociableness of mankind. Puffendorf concluded that the real cause was experience of the injuries which one man might inflict upon another. He considered that civil society must have been constituted first by a covenant of a number of men, each with each, to form a commonwealth, and to be bound by the majority, —in which primary covenant they must be unanimous; that is, every dissentient would retain his natural liberty; next, by a resolution or decree of the majority, that certain rulers shall govern the rest; and lastly, by a second covenant between these rulers and the rest, one promising to take care of the public weal, and the other to obey lawful commands. This sovereignty is founded on actual covenants, and is not conferred, except indirectly like every other human power, by God.[2]

Punishment is defined as an evil inflicted by authority upon view of antecedent transgression. Punishments ought to be measured according to the object of the crime, the injury to the commonwealth, and the malice of the delinquent; hence offences against God should be deemed the most criminal; and next, such as disturb the state; then, whatever affect life, the peace or honour of families, private property, or reputation. He concludes by establishing a great truth—that no man can be justly punished for the offence of another, not even a community for the acts of their forefathers.[3]

It will thus be seen that Puffendorf attempted to reconcile the opinions of Hobbes and Grotius; and he discussed natural law as a separate question, independ-

[1] Book vii. chap. 3, sec 1. [2] Book vii. chap. 3. [3] Book viii. chap. 3.

ent of the obligations of revealed religion or positive civil law. Puffendorf maintained as well the principle of sociability which Grotius had started, as the principle of selfishness described by Hobbes; he deduces from both the social compact, and the laws of morality and jurisprudence. He does not discriminate between natural and moral right, yet he may be said to have laid the foundations of a universal philosophy of practice.

2. Leibnitz, 1646–1716.

Works:—G. G. Leibnitii, opera omnia, studio Ludovici Dutens: Geneva, Tournes, 1768; 6 vols. 4to. German Works, edited by Guhrauer, 8vo: Berlin, 1838.

Authorities:—Fontenelle, Eloge de M. de Leibnitz: Paris, 1716. Bailly, Eloge de M. de Leibnitz, 1769, 4to.

Leibnitz has been compared by Gibbon to those conquerors whose empire has been lost in the ambition of universal conquest. He might have said with Faust—

> "Habe nun, ach! Philosophie,
> Juristerei, und Medicin,
> Und leider! auch Theologie,
> Durchaus studirt, mit heissem Bemühn."

Amongst his numerous attainments he comprised both the philosophy of universal jurisprudence and the details of practical law. Yet he left no complete works on the subject, and the scattered fragments of his doctrines are found amongst his pamphlets and letters.

Gottfried Wilhelm Leibnitz was born at Leipsic, on the 23rd of June, 1646. His father was professor of Moral Philosophy at the University of Leipsic. From his earliest youth he applied himself with assiduity to a lengthened course of study. Leibnitz commenced his career by presenting himself at the age of twenty for the degree of Doctor of Laws of Leipsic University. He was rejected by reason of his age, repaired to the University of Altorf, where a dispensation was accorded to him, and he was accepted as doctor. There he was offered the post of Professor Extraordinary. He did

not accept the place, and transferred himself to Nuremberg. His first studies were in the barren field of alchemy. He read in succession the classic poets, orators, historians, and jurists; nor did he neglect the exact sciences. He endeavoured to show that he was the first theologian, jurist, metaphysician, geometer, mathematician, and mechanic of the age. In the present brief notice we must confine ourselves to the discussion of his works on Politics and Jurisprudence.

When John Casimir, King of Poland, had abdicated the crown in 1668, Philip, Count Palatine of Neuburg, was one of the candidates. Leibnitz, then only twenty-two years of age, was employed by him to write a treatise in his favour, under the *nom de guerre* of Georgius Ulicovius. In the previous year he had published a treatise entitled, "Cesarini Furstenerii de Jure Suprematus ac Legationis Principum Germaniæ." This was written in reference to the ceremonial difficulties attending the treaty of Nimeguen. A difficulty had been raised as to the free Princes of the Empire who were not electors; and there was a reluctance to grant to their ministers the same titles and the same honours as to those of the Princes of Italy. In this political tract Leibnitz advanced an idea in reference to the imperial dignity which could not but displease other monarchs. He asserted that all Christian states, at least those of the west, were only one body, of which the Pope is the spiritual head, and the Emperor the temporal head; that there pertains to both one and the other a certain universal jurisdiction; that the Emperor is the general, the defender, the advocate of the Church, principally against the infidels; that hence come the titles of sacred majesty and holy empire; and that, although all this did not exist by divine right, yet it is a species of political system formed by the consent of the nations. From this he draws favourable consequences for the free Princes of Germany, who hold no more from the Emperor than other kings ought to hold.

The next work upon which Leibnitz was employed

was the History of the House of Brunswick. In order to collect the necessary materials, the Princes sent him to travel over the entire of Germany. He obeyed their directions, visited all the ancient abbeys, examined the tombs and other antiquities. Thence he visited Italy, where the marquises of Tuscany, of Liguria, and D'Este, sprung from the same origin with the Princes of Brunswick, possessed their principalities. He returned from this journey in 1690. Leibnitz had made an abundant collection, more abundant than was necessary for the history of Brunswick. From this superfluity he made an ample selection, of which he published the first volume in folio in 1693, under the title of "Codex Juris Gentium Diplomaticus." To this volume he prefixed a well-written and well-considered Preface.

In the present sketch I cannot consider the other philosophical labours of Leibnitz, in which he rivalled Newton, confuted Bayle. He lived a flourishing and honourable life, having enjoyed the respect of the learned world of Europe, and substantial tokens of the regard of its crowned heads, in the shape of pensions from the Emperor, the Czar, and the King of England. His memory was extraordinary. It was his custom to make extracts from all that he read, and to add on the paper his own reflections. This writing seemed all that was necessary to engrave the subject on his memory for ever. He was always ready to answer questions on every matter; and William III. of England used to call him his walking dictionary. He conducted always an immense correspondence. It pleased him to enter into the labours and projects of all the *savans* of Europe. And all who wrote to him were certain of a reply. Leibnitz died in Hanover, in 1716. I shall now proceed to analyze some of his works on Jurisprudence.

His own idea of Jurisprudence was elevated and noble. "I would wish," said he, "that there existed a treatise, which setting out from clear definitions, would deduce as by a thread certain conclusions from certain principles, which should establish in order the founda-

tions of all our actions, and of the exceptions permitted by nature, which in fine should give to our youth a means of resolving all difficulties by a determinate method. This exact and regular science is still a desideratum. It might have been expected from the judgment and learning of the incomparable Grotius, or from the profound genius of Hobbes, if the one had not been distracted by too much business, and if the latter had not established corrupt principles, by which he was enthralled. Selden might have done more and better than he has done, if he had consecrated to this subject all his learning and talents."[1]

Leibnitz criticises Puffendorf on three points—the end, the object, and the efficient cause of natural law. On the first point Leibnitz reproaches Puffendorf with enclosing natural law within the limits of this life, and excluding from it any consideration as to the immortality of the soul. This is to mutilate the science, and to exclude from it many of the duties of this life. Puffendorf's second error, according to Leibnitz, was in the limiting of natural law to exterior acts, and in the excluding of all those internal emotions which are not externally expressed. Again, Puffendorf is deceived as to the efficient cause of law. This cause he does not seek in the nature of things, and in the eternal principles of divine reason, but in the decree of a superior. According to him duty is the action of a man who conforms himself to the precepts of law by means of an obligation attached to it; and he defines law as the decree by which a superior obliges the person who is submitted to him to conform his actions to the will of the superior. Thus Leibnitz endeavoured, in opposition to the attempts of Puffendorf and Thomasius, to confound in one science morality and law. Kant in later times, by new and more profound reasons, essayed to establish again the separation.

In 1667 Leibnitz published the short treatise entitled, "Methodi Novæ discendæ docendæque Jurisprudentiæ."

[1] Works: edition by Dutens, vol. iv. part iii. page 275.

He was then only twenty-two years of age; but the work exhibits vast erudition and originality. The first part is on education in general; the second on Jurisprudence alone. I consider it so important, yet so little known, that I shall give a brief abstract of its contents. Leibnitz defines Jurisprudence to be the Science of Right—Scientia Juris, on some case or fact being proposed. When we attempt the method of treating it, we must do two things; first, delineate in idea the perfect jurisconsult, and whatever pertains to his perfection, as Cicero has done in his books "De Oratore;" secondly, point out the method of arriving at perfection; as Plato has in his books on the Republic put forward the idea; but in his dialogues on the Laws, what any one might compass.[1] Whatever pertains to the erudition of the perfect jurisconsult may be divided, like theology, into the didactic or positive part, containing those things which are expressly extant in authentic books, and belong to acknowledged right; the historical, which treats of the origin, authors, changes, and abrogations of the laws; the exegetical, which interprets the authentic books themselves; and the polemical or controversial, which determines by reason and analogy unsettled cases in the laws. Of these the didactical and polemical are properly the parts of Jurisprudence, but the historical and exegetical only "requisita." The latter are theoretical, the former practical. The example of the division is with reason transferred from Theology to Jurisprudence, because there is an extraordinary resemblance between the faculties. Each has a twofold origin; partly reason (hence natural theology and jurisprudence); partly Scripture, or some authentic book; the former containing Divine laws, the latter human laws.[2]

Didactic Jurisprudence may not inaptly be termed by the name of Elements, in imitation of the Elements of Euclid, whom, in the titles to their books—Hobbes in the Elements "De Cive et de Corpore," and Felde and Puffendorf in their Elements of Jurisprudence, have fol-

[1] Works, edition by Dutens, Geneva, 1768. vol. iv. p. 180. [2] Id. vol. iv. p. 181.

lowed. Elements are composed of two things—the explanation of terms or definitions, and of propositions or precepts, in a separate book. The definitions or explanations of judicial terms are to be treated without the intermingling of precepts or rules. This may be termed the divisions of Right—*partitiones juris.*

Leibnitz then proceeds to comment on the various arrangements of former works, and to censure them, from the Institutes of Justinian, down to the numerous German writers.[1] Leibnitz censures the celebrated division of law into Persons, Things, and Actions. This division, originally published by Gaius, had been adopted in the Institutes of Justinian, and inextricably incorporated with the body of the Roman Law. It has been followed in modern times by Sir William Blackstone, and in the Code Napoleon. If it had always been interpreted according to the maxim of Weisembech,—*omne jus redditur personis, de rebus, per actiones*,—this doctrine might not have exercised such a deteriorating effect upon the development of Law; but its faulty nature will be best seen from the criticism of Leibnitz.

First, the division into persons, things, and actions, is superfluous; for actions arise as well from the rights of persons, as from the rights of things. And this division is drawn, not from matter of law, but from matter of fact; for persons and things are matters of fact, power and obligation terms of law; and a division of Jurisprudence ought to be taken from matter of law.[2]

Leibnitz further censures the diversity of arrangement between the Code, Digest, and Institutes. A new method of arrangement would bring incredible advantages, if it were accurate; for, in the first place, a wonderful compendium of things to be learned would arise, whilst by general rules, at the same time, infinite special rules will be learned; and the genera being premised, we will gradually descend to the species.

To take an example,—what is the need of specially inculcating in one place that a minor, in another that a

[1] Vol. iv. part iii. pp. 183, 184. [2] Sec. 10, p. 183.

madman, in a third that one who is absent, requires a guardian of his property, when the general rule is manifest from the very principles of political science, that he who is not able to manage his own affairs requires a guardian?[1]

Leibnitz then proceeds to give his own definitions. Jurisprudence is the science of actions so far as they are termed just and unjust; but that is just and unjust which is publicly useful or injurious; publicly, that is, first, as to the world, or its ruler God; secondly, as to the human race; finally, as to the state. Hence Jurisprudence is divine, human, and civil. Jurisprudence should also be divided into as many parts as there are causes which produce rights and obligations. But the causes which produce rights and obligations are five:—1st. Nature, which gives the liberty and power of dealing with that which is the property of no one *(res nullius)*. 2nd. Succession, by which the rights of the deceased are transferred to heirs. 3rd. Possession. 4th. Contract. 5th. Injury. After some other definitions belonging to Didactic Jurisprudence, he proceeds to Historical Jurisprudence.[2] Historical Jurisprudence is either internal or external. The internal history of law is that which surveys the laws of different states; for example, the works of Aristotle and Theophrastus, which have not descended to modern times. Leibnitz gives a complete list of historical works on the history of Law.[3]

Exegetical Jurisprudence is twofold—*ex textu*, or *ad textum*. The former is collected from various texts, not in the order of the texts; the latter is accommodated, κατὰ πόδα, to the very texts themselves. The former pertains to the Philology of Law; the latter to the Commentaries on Law.[4]

The Philology of Law consists in the application of the sciences to Jurisprudence; and is divided into Legal Grammar, Didactics, Rhetoric, History, Ethico-Politics, Logico-Metaphysics,—in fine, Legal Physics. The most

[1] Page 184.
[2] Page 191.
[3] Secs. 29–41, vol. iv. p. 197.
[4] Page 198.

important division of Legal Physics is Medical Jurisprudence. All these Leibnitz illustrates with his own definitions; and gives the works of the principal authors on each branch.

Legal Grammar also requires juridical concordances. In this the theologians have surpassed the jurists. It is unadvisable, however, to develop into the excessive bulk under which the theologians labour. Both theological and juridical concordances might be portable, if only the more remarkable places were taken note of, and in them only a somewhat unusual use of a word; for what is the need of collating things almost the same?

The interpretation of any text is real or textual. The real is that which elicits certain propositions from the law, and treats them absolutely, proving, and objecting, and solving objections, if it so seem fit. The textual interpretation is κατὰ πόδα, according to the words of the law; and is either total, for the whole law, or partial, for individual words. The total interpretation treats of the connexion of the law with other laws, the author and history of the law, and the occasion upon which it was passed.[1]

Polemical Jurisprudence is so infinitely diffused, that it cannot be exhausted, for new cases daily arise. Meantime it must be the business of the Jurist to collect and decide the cases already ventilated; so that when he shall be carried to new regions, that is, meet with new cases, he may easily extricate himself by means of the magnet—natural law.[2]

The principles of decision are reason drawn from natural law, and analogy from certain civil laws. For if we consider the matter accurately, all civil law is rather a matter of fact than of right; inasmuch as it is to be proved, not from the nature of things, but from history. For it is to be proved that the law was promulgated, that the custom was introduced; then it is to be proved that he who passed the law had acquired to himself the power of legislation.[3]

[1] Sec. 64, p. 207. [2] Sec. 70. [3] Sec. 71.

There are three grades of natural law,—the strict law, equity, piety,—*jus strictum*, *æquitas*, *pietas;*—of which the latter is more perfect than the antecedent, and confirms it, and in case of opposition derogates from it. Strict or pure law descends from the definitions of terms, and is, weighed rightly, nothing more than the right of war and peace; for between person and person there is the right of peace only so long as the other has not begun war, or committed an injury; but between a person and a thing, because a thing does not possess reason, there is a perpetual right of war. It is permitted to a lion to tear a man in pieces, and to a mountain to crush a man in ruin; on the other hand, it is permitted to man to chain the lion, to pierce the mountain. But the victory of a person over a thing, and the captivity of a thing, is called possession. Possession, therefore, gives the right of a person over a thing by the right of war, provided the thing be the property of no person. For if the thing be the property of any person, it is no longer permitted to injure it, or take it away, any more than to kill the slaves of another, or to receive the runaways from another. If, therefore, one person has injured another in his person or in his property, that gives to him the right which he had over a thing, or the right of war. There is also amongst the species of injury a pernicious deception, by which a damage is inflicted on the mind; hence arises the necessity of observing promises. Hence is patent a pure single precept of natural law,—To injure no one, lest there be given to him the right of war. To this pertains Commutative Justice, and Right, which Grotius terms Faculty.[1]

Equity or equality, that is, the ratio or proportion of two or more, consists in harmony or agreement—*Æquitas seu æqualitas, id est, duorum pluriumve ratio vel proportio, consistit in harmoniâ seu congruentiâ.* This requires that against him who has injured me I should not wage an internecine war, but seek for restitution; that arbitration should be employed; that imprudence should not be so

[1] Sec. 74, p. 213.

much punished as fraud and malice; likewise, that crafty contracts should be nullified, and relief given to those who were deceived.[1]

The third principle of law is the will of a superior. But a superior is, in the first place, by nature—God; and his will is either natural—hence piety; or a law—hence the Divine positive law. Next, a superior exists by compact—as man; whence arises the Civil Law. Piety, therefore, is the third grade of Natural Right, and gives to the rest perfection and effect; for God, as being omniscient and wise, confirms pure law and equity;—as omnipotent, executes it. Hence the good of the human race, nay, the glory and harmony of the world, coincide with the Divine will. From this principle, we should not injure even the brute creation. From this fundamental principle, no one should even injure himself—for we ourselves are gods, to whom Omnipotence has given power over all things; hence that principle—Live honestly. And since strict law and equity want a physical sanction, God accomplishes, that whatever is publicly useful to the human race and the world, is also useful to individuals, and that every thing honest is useful, and every thing disgraceful injurious.[2]

Leibnitz then gives a lengthened course of legal study; and concludes the "Novæ Methodi" with a catalogue of desiderata, in imitation of Bacon, in the "De Augmentis Scientiarum." Some of these desiderata—still desiderata—are, *theatrum legale*, or the laws of all nations, places, and times, placed in parallel order; *historia mutationum legis—philologia juris—philosophia juris—institutiones juris universi—juris naturalis elementa demonstrative tradita—bibliotheca juris—vitæ jurisconsultorum—repertorium juris—pandectæ juris novi.* An attempt to translate these terms will show the student how deficient the English language is in the scientific terminology of law.

Leibnitz had scarcely published his "New Method of Jurisprudence," when he undertook the vast design of recasting the whole body of the Civil Law. Weighing

[1] Sec. 75. [2] Sec. 76, p. 214.

all the faults which are attributed to the work of Tribonian, he considered that it lay with him to free it from all confusion. There was a three-fold confusion:—of the works themselves, of the subject matter, and of the laws. The confusion of the works consists in this, that the Roman Law is comprehended in diverse codes; that the order of one code is different from the order of another; and this inconvenience must be met by removing the variety of works; whatever is contained in the Code, Novels, Institutes, and Digest, must be collected in one work; the different changes of the law are to be accurately separated, following the order of time; what is contained in the Institutes is to be accommodated to the order of the Digest, rather than *vice versâ*. Leibnitz, approaching the confusion which occurs in matter, divides this into general, subalternate, and special. The confusion of laws consists partly in their dispersion, partly in their perturbation. The laws dispersed are those which are contained under their proper titles, indeed, but are not collocated in their proper order.

The rules given by Leibnitz are well adapted to remove confusion, and should be studied by those engaged in the codification of laws. He considers that all the books of Roman law should be joined in one consonance of law, removing all distinction between Digest, Code, Novels, and Institutes; that a beginning should be made from generals; that then there should be a proceeding to subalternates and specials; that the order of the ancient law should be retained where it can be retained; that the laws, or paragraphs referring to the same title, should be collected together, and these arranged according to the natural order of the *circumstantia;* that the law which can be referred to many titles, should be placed under that on which depends the reason of the decision of the same law. Leibnitz gives many other similar rules, which should be consulted and studied by all engaged in the labour of codification.

The letter of Leibnitz to a friend, "De Nævis et Emendatione Jurisprudentiæ Romanæ," may be considered as

an appendix to the preceding work. In it he states the principal errors of the Roman jurisprudence; the chief abuses that under it might arise in the progress of a cause; finally, he proposes a plan of bringing under one tabular form all universal rules, from the combination of which all questions could be decided.

The system under which Leibnitz proposed to codify the Roman Law might be usefully applied to every Law. There are four principal defects in all laws of every advanced nation—superfluity, defect, obscurity, and confusion. In the body of every law we meet matters fallen into disuse. If we do not exclude them they must be noted with care. Obscurity often keeps her dominion by reason of our ignorance of the secrets of language and history. Finally, confusion results from the variety of works and matters. The consequences are deplorable. Doctors are more often cited than laws. Law becomes infinite, uncertain, incomprehensible, and arbitrary. It is the chaos of antiquity.[1]

Leibnitz was occupied during the remainder of his career with the advantages of a methodical codification. He wrote to Kestner, in 1708: "I have long thought that if the celebrated jurists of Germany would communicate their studies to one another, something might be done which our rulers would easily approve of; but many of those in authority silently rejoice in the uncertainty of the law."

The two Dissertations which Leibnitz prefixed to the "Diplomatic Code of International Law" met with a great success. Heineccius recommends their study after the great works of Grotius, Hobbes, and Puffendorf. In them Leibnitz shows how uncertain future history would be if not based upon public documents; how useful it is to have before our eyes conventions and treaties; from which it is apparent what were the events of wars, and from which can be illustrated the political arts. Leibnitz touches on the authority of the Emperor over the Church and all Christians; the authority of the Pope over all

[1] Vol. vi. p. 4, ed. Dutens.

churches, and which authority was the means of introducing amongst Christians many things pertaining to the Law of Nations.

In the commentary on Puffendorf, Leibnitz has left a refutation of the principles of natural law as employed by that jurist. He says that his principles labour under many defects. Something is still required which would exhibit lucid and fruitful decisions, which, from correct principles, would draw conclusions as by a thread, which might afford to the students of the science a certain means of supplying things omitted, and deciding questions in a determinate manner. These things might be expected from absolute science, duly treated:—"Optarem tamen exstare aliquid firmius et efficacius, quod lucidas fœcundasque definitiones exhibeat; quod ex rectis principiis conclusiones veluti filo deducat; quod fundamenta actionum exceptionumque naturâ validarum omnium ordine constituat; quod denique scientiæ alumnis certam rationem præbeat prætermissa supplendi, oblatasque quæstiones per se decidendi, determinatâ quâdam viâ. Hæc enim a scientiâ absolutâ et ritè traditâ expectari debent."[1] Leibnitz proceeds to add, that something of this nature might have been expected from the judgment and learning of Grotius, or from the profound intellect of Hobbes; but many cares occupied the former, and the latter had set out from evil principles. Selden could have done more and better, if he would have spent his genius and learning with more zeal on such a work.

Leibnitz has expressed a considerable portion of his legal system in the dissertations prefixed to the "Diplomatic Code of the Law of Nations." The first dissertation is entitled, "De Actorum publicorum Usu, atque de Principiis Juris Naturæ et Gentium, primæ Codicis Gentium Diplomati Parti præfixa."[2] In the Introduction he alludes to the slight regard paid to treaties. Lysander used formerly to say that boys played with nuts, old men with oaths. And an elegant trifler in Batavia hung

[1] Monita quædam ad S. Puffendorfii Principia, sec. 1, Works, vol. iv. p. 276.

[2] Works, vol. iv. p. 287.

up a picture of a graveyard as a symbol of perpetual peace.

> "Qui pacem quæris libertâtemque, viator,
> Aut nusquam aut isto sub tumulo invenies."

Truly it seemed to be the condition of Europe, in the time of Leibnitz, for the sovereigns always to make war, and always treat of peace.[1]

History is twofold—Public and Private. And the laws of history are two;—both of which cannot be equally observed in each species of history: for the principle of Public History is to say nothing untrue—*nihil falsi dicere;* of Secret History, to omit nothing true—*nihil non veri dicere.*[2]

Leibnitz then proceeds to give a series of definitions of Justice according to the Platonic theory, making it to embrace the whole sphere of human duty. The doctrine of Right has been included by nature within narrow limits, but extended by the human mind to a gigantic space. The ideas of Right (*Jus*) and of Justice, even after so many illustrious writers, are very imperfect. Right—*Jus*—is a moral power, and obligation a moral necessity. *Moral* is defined by Leibnitz as that which with a good man is equal to *Natural.* A good man is one who loves all, as far as reason permits. Justice is the virtue that governs this affection. Charity is universal benevolence; but since wisdom ought to direct charity, a definition of this too is required. Wisdom is the science of happiness.[3]

From this fountain flows the *Jus Naturæ;* of which there are three grades—*jus strictum*, in commutative justice; equity, or, in the narrower sense of the word, charity, in distributive justice; finally, piety or probity, in universal justice: whence arise the general precepts of justice—to injure no man, to give each man his own, and to live honestly. The precept of strict law is that no one is to be injured, lest, in the state, a legal redress

[1] Dissertatio I. Primæ Codicis Gentium Diplomati Parti præfixa, sec. 1, Works, vol. iv. p. 294.

[2] Sec. 2. [3] Sec. 11.

should be given, or, without the state, the right of war arise. Hence springs that Justice which the philosophers call Commutative, and the Right—*Jus*—which Grotius terms Faculty.

Leibnitz terms the superior grade of justice, Equity, or Charity; the meaning of which he extends beyond the rigour of strict law to those obligations from which no legal action accrues to those who are concerned—for example, Gratitude, or Almsgiving—and to which the term Aptitude—*Aptitudo*, not Faculty—*Facultas*, is applied by Grotius. And as it is in the lowest rank of justice to injure no one, so it is in the middle rank of justice to benefit all, but as far as is suitable to each one, or as far as each one deserves; since we cannot favour all. Therefore the justice of this second rank is distributive; and the precept of Right is that which orders his own to be given to each. And to this are referred, in a government, the political laws which procure the happiness of subjects, and everywhere accomplish, that those who possess the aptitude should acquire the faculty —that is, that they may be able to seek what it is right for others to afford them. And since in the lowest grade of justice, the distinctions of men are not regarded, in this superior grade merits are weighed; whence privileges, rewards, punishments, have a place.[1]

Leibnitz has characterized the highest grade of justice by the word Probity or Piety.[2] Pure or strict justice arises from the principle of preserving peace; equity or charity strives for something more. In a word, strict law avoids unhappiness; the superior law tends to happiness, but such as befalls this mortal life.[3]

Besides the eternal laws of nature flowing from a divine origin there is also the voluntary law, received in manners, or established by a superior. And in a State civil law receives its force from him who has the supreme power. Outside the State there is room for the voluntary law of nations received by the tacit consent of nations.[4]

[1] Sec. 12, vol. iv. p. 297.
[2] Sec. 13, p. 297.
[3] Sec. 13.
[4] Sec. 14, p. 297.

Christians have another common tie in the Divine Positive Law. Leibnitz apparently regrets that there cannot exist in Europe one Christian State, of which the head in spiritual matters should be the Pope, in temporal matters the Emperor:—"Et in universum (nec sane præter rationem) ante superioris seculi schisma, placuisse diu video ut quædam gentium Christianarum Respublica communis intelligeretur, cujus capita essent in sacris Pontifex Maximus, in temporalibus Imperator Romanorum, qui et de veteris Romanæ Monarchiæ jure retinuisse visus est, quantum ad commune Christianitatis bonum opus esset, salvo jure regum, et Principum libertate."[1]

The remainder of the dissertations prefixed to the "Diplomatic Code of the Law of Nations" is chiefly concerned with the details of the diplomacy of the age.

Leibnitz never had the leisure to carry out his plans on the subject of Jurisprudence. Writing to Magliabecchi, in 1697, he says:—"Multi anni sunt, quod promisi illustrare jurisprudentiam, et amplissimum juris oceanum ad paucos revocare fontes limpidos rectæ rationis, ut appareat tum quid pronuntiandum esset si nullas leges haberemus, tum quibus modis, recepto jure, a simplicibus naturæ placitis sit recessum, aut cur oportuerit aliquid illis addi. Nam multi quidem tractavere Jus Naturæ, sed pauci eorum simul ab interiore philosophiâ et a Juris Romani cognitione fuere admodum instructi."[2]

In conclusion, the genius of Leibnitz in unconnected studies agitated the four fundamental questions of Jurisprudence in the eighteenth century—the philosophy of Law, the method of Law, Codification, and the Roman Law. He traced a general method of theoretical studies. He embodied the loftiest idea of practice—a general code. He sketched an encyclopedia of legal science, and commenced for Germany a new era. He was the founder of a school in Germany which distinguished itself for the fundamental nature of the principles it embraced, and the systematic manner in which they were developed.

[1] Sec. 15, p. 298. [2] Epist. xxviii. Works, vol. v. p. 118.

Leibnitz laid the foundation of the great revolution in the studies of Germany, by combining the philosophical systems which had prevailed up to his time,—by his extraordinary learning, the liberality of his mind, and that spirit of toleration which led him always to discover some favourable point of view in what he criticised—something, even in the most despised and neglected systems, which might suggest matter for research.[1] In the succeeding century Christian Thomasius clearly marked the distinction between Law and Ethics, and limited the Jus Naturæ to those principles which refer to our external conduct. Gerhard, Gundling, and Achenwall reduced to words the true theory of Natural Laws in relation to Jurisprudence, when they defined justice as that part of our external duties which is capable of being enforced. Wolf subdivided Practical Philosophy into Universal Practical Philosophy, Ethics, Natural Rights, and Law and Politics. These jurists, as well as the professors of the modern Historical School of Germany, although not absolutely scholars of Leibnitz, still have collected and combined many of his bright ideas.[2]

[1] Tennemann's History of Philosophy, sec. 355.

[2] Thomasius, born at Leipsic, 1655, died at Halle, 1728: Fundamenta Juris Naturæ et Gentium ex sensu communi deducta, Halle, 1705–1718, 4to. Ephraim Gerhard, died 1718: Delineatio Juris Naturalis sive de Principiis Justi, libri iii., Jena, 1742, 8vo. N. J. Gundling, born at Nuremberg, 1671, died at Halle, 1729: Jus Naturæ et Gentium, Halle, 1714, 8vo. Gottfried Achenwall, born at Elbingen, 1686, died 1756: Jus Naturæ, Gottingen, 1750, 7th edition, 1781. Wolf, born 1679, died 1754: Philosophia Civilis, Halle, 1746, 4 vols. 4to.

END OF BOOK IV.

BOOK V.

HISTORY OF JURISPRUDENCE IN THE EIGHTEENTH CENTURY.

"Qui de legibus scripserunt, omnes, vel tanquam philosophi, vel tanquam jurisconsulti, argumentum illud tractaverunt. Atque philosophi proponunt multa, dictu pulchra, sed ab usu remota. Jurisconsulti autem, suæ quisque patriæ legum, vel etiam Romanorum, aut Pontificiarum, placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam e vinculis sermocinantur. Certe cognitio ista ad viros civiles proprie spectat; qui optime norunt, quid ferat societas humana, quid salus populi, quid æquitas naturalis, quid gentium mores, quid rerumpublicarum formæ diversæ; ideoque possint de legibus, ex principiis et præceptis tam æquitatis naturalis quam politices decernere."

"All who have written of laws have treated that subject either as philosophers or lawyers. And the philosophers propound many things beautiful in speech but remote from use. But the lawyers, each bound to the pleadings of his own country, or even to those of the Roman or Pontifical laws, do not use a sincere judgment, but discourse, as it were, out of fetters. Certainly this knowledge properly pertains to statesmen, who best know what human society can bear, what the safety of the people, what natural equity, what the diverse forms of states. And hence they may be able to determine concerning laws, from the principles and precepts as well of natural as political equity."

Lord Bacon: De Augmentis Scientiarum, lib. viii.

BOOK V.

HISTORY OF JURISPRUDENCE IN THE EIGHTEENTH CENTURY.

CHAPTER I.

THE ITALIAN JURISTS OF THE EIGHTEENTH CENTURY.

1. Vico, 1668–1743.

Authorities:—Lerminier, Histoire du Droit. Vico et l'Italie, par J. Ferrari, Paris, Capelle, 1841. Histoire de l'Economie Politique en Italie, par Pecchio, traduite de l'Italien par Gallois, Paris, Levasseur, 1830. Janet, Histoire de la Philosophie Morale et Politique, Paris, 1858.

Works:—Opere di Giambattista Vico, ordinate ed illustrate, coll' analisi storica della mente di Vico in relazione alla scienza della civiltà, da Giuseppe Ferrari, 6 vols. 8vo. Milan, 1836.

Southern Italy has been a land of great conceptions and great misfortunes. Magna Græcia in the most ancient times exhibited the legislation of Pythagoras, of the Locrians, of Charondas,—then suddenly the massacre of the Pythagoreans, of the nobles by the Plebeians. The Sybarites, masters of twenty-five cities, could not resist the revolution, and were obliged to fly elsewhere, in order to seek an asylum. Beside these violent catastrophes are found the delights of Capua. Under the Roman dominion Southern Italy is the land of Marius —of a crowd of other great men. In the middle ages the victory of forty Norman Knights recalls to memory the sudden revolutions of Magna Græcia. But these valiant men did not conquer the climate of Naples—they could not follow in the steps of the Normans of England, and the power of the Barons in Naples was destroyed by the *coup d'etat* and massacre in 1480. From that period revolution has succeeded revolution, and almost every foreign attack has been followed by the conquest of the kingdom. Since the ancient

Roman time the great men of this country have not been successful in raising the general character of the people: Saint Thomas, Salvator Rosa, Campanella, Vico, Filangieri, all here appeared in the midst of the most profound and barbarous ignorance. The Spanish conquest, by exalting the Italian nobility, injured Naples. In the seventeenth century the gentlemen of the kingdom had many privileges. The nobles had castles, villages; there they administered justice to their peasants, and protected brigands. Hence arose hereditary feuds and feudal wars. The nobility, too, were exempted from most of the burdens of taxation, and were consequently prodigal of the tribute which they voted for Spain. The Spanish Viceroy represented all that is disgraceful in modern bureaucracy. The insurrection of Masaniello is the great event of the history of Naples under the Spanish rule. In 1647 the people of Naples groaned under excessive taxation; the nobles speculated on the general misery, and increased it by their monopolies. Many attempted to smuggle, but they were seized and imprisoned. The fisherman, Masaniello, appears on the historic scene. His name now would be forgotten by all except the historian, were it not that the divine opera of Auber constantly tells the great capitals of Europe how easily a revolution may be effected in Naples. Masaniello was completely ruined in paying the ransom of his young wife, who had been seized at the gates of the town with a little corn. It was the eve of the fête of the Madonna. The immense populace, without work and famishing, joined in a riot between the custom-house officers and some poor peasants who had not wherewith to pay the octroi upon some baskets of fruit. Masaniello put himself at the head of the mob. They soon attacked and carried the town-hall. The Viceroy with difficulty saved himself. On the one side now the cannon of the three forts were directed against Naples, and the Spanish nobility joined the soldiers. On the other, 200,000 men, armed with pikes, swords, and sticks, were under the orders of Masaniello; these spread themselves through

the streets, and destroyed upwards of thirty of the palaces of the nobles. The bandits and outcasts of society were invited to aid the Government, as the King similarly summoned the Lazzaroni during the insurrection of 1848, and gave up the city to their plunder. The bandits were defeated by the rebels, and the prisoners were executed. Masaniello was the chief of the revolution. Some learned men, who had been imprisoned by the Spanish authorities, assisted him; but they were obliged to wear masks on their faces. Masaniello was induced by the Archbishop of Naples not to act as a rebel to Spain. He was terrified at the greatness of the rebellion, and the Archbishop gave him hopes of pardon. Masaniello and the Viceroy met; peace was sworn; many privileges assured to the people; Masaniello was created Duke of Saint George; magnificent fêtes were given. On the following day Masaniello, either intoxicated by his miraculous elevation, or poisoned by his enemies, became mad. He galloped through the city, striking at all he met; he sent many of his friends to the galleys; and designed to destroy the houses in the principal street in order to build a palace for himself. All were dismayed by his frenzy; and a conspiracy being formed, Masaniello fell beneath the daggers of his friends. The mob seized the body, cut off the head, and foully dishonoured it. A re-action ensued; the people resumed their madness. One moment they believed that Masaniello had risen from the dead to lead them to the battle; the next they made him a saint, and deposited his body in the cathedral. The funeral of Masaniello suspended the civil war. Four hundred priests, thousands of children, four thousand women, attended; forty thousand soldiers trailed their banners in the dust, and an immense populace followed round the bier of a poor fisherman. The artillery of the hostile troops united with the bells of the town in giving the last honours to the mortal remains of Masaniello. The people were again prostrate; the revolutionary frenzy was over; and for two centuries the

people of Naples made no attempt to escape from despotism.

Before Vico another eminent Neapolitan had made some contributions to the study of Jurisprudence. Vincentio Gravina[1] taught alternately at Rome and Naples, and deserves a brief notice.

The first book of the Origins of Civil Right treats of the foundation of Rome, the continuation of its history, its jurisprudence, its jurists, Justinian, the middle ages, Irnerius and Bologna, Alciatus and the sixteenth century. In the second book Gravina ascends to the foundation of society, and the principles of justice. Gravina represents to us man as submitted to two laws:—At first he is subjected to the universal law of animated beings, which enthrals him by an irresistible movement and an inevitable fatality; next he obtains a consciousness of himself by means of reason, and by his will creates himself as a person free in the midst of the current of affairs that would hurry him away. On one side is the world with its eternal harmony which nothing can disturb, and which a passing crisis does not even disconcert; on the other, man in the midst of all the life which is foreign to him, alone is actuated by thought, acknowledges engraven on his heart a law proper to himself alone, and thus perceives himself to be a moral and responsible being:—"Quamobrem in hac universitate rerum solus homo est culpæ capax, quia solus homo peculiarem accepit naturam seorsum a rebus corporeis aliis, ac solus legem subit præcipuam, naturæ mentis congruentem sejunctamque a lege communi rerum aliarum unde secum solus ipse dimicat, quum duabus discrepantibus inter se legibus horsum illorsum pellatur; solus denique culpam incurrit quando lege corporis abducitur a lege mentis, quæ utpote hominis propria debet ei unice imperare, perinde atque lex corporis naturæ corporum dominatur universæ."[2]

Giambattista Vico was born at Naples in 1668, about

[1] Vincent Gravina, b. 1664; d. 1718. Originum Juris Civilis libri tres.
[2] Origines, lib. ii. cap. 4.

twenty years after the revolt of Masaniello. His father was a poor bookseller; and Vico obtained his education at the Jesuits' School. Even in his early youth he was distinguished for extraordinary application, and used to pass the entire night in study. Having mastered the ordinary course of the school, he proceeded to study philosophy under Father Ricci the Jesuit, a disciple of Duns Scotus, and a partisan of the doctrine of Zeno. Henceforth, Realism appeared to him preferable to Nominalism. Quitting the school of Ricci, he shut himself up for an entire year to study Suarez. He did not repent of this. This author, says Vico, has marvellous perspicuity, his style is elevated, his eloquence incomparable. His father now urged Vico to the study of the law; and he attended the lectures of Verde, who, amongst the doctors of the University of Naples, was one of the most profound legists and eloquent professors, but, like many other men great in their own time and sphere, is now comparatively unknown. Not being able to learn much from this professor, Vico applied himself to the study of the Civil Institutes of Vultejus, and the Canonical Institutions of Canisius. He eagerly began to trace the general ideas of right from particular cases, and from the original signification of the words employed by lawyers.

Vico's excessive labours, the poverty of his family, and the new ideas which confusedly agitated his mind, destroyed his health. One day that overcome with weariness and disgust at his position in life he was resting in a library, sighing after the repose necessary to accomplish his grand projects, the Bishop of Ischia, Giovanni Rocca, approached him, inquired with interest into his circumstances, and interrogated him on the merit of the different methods of education suited for the study of the law. Vico then was meditating upon the work since published under the title "*De nostri temporis studiorum ratione.*" He expounded his system to the good bishop with such warmth and clearness, that he asked Vico to make a trial of it upon his young nephews, who inhabited

a fine castle situate in a delightful climate, and furnished with a rich library. Vico accepted the appointment and discharged its duties for nine years. There he studied the Canon Law, the Christian dogmas, and, principally, the examination of the question of Grace and Liberty. Vico then reflecting on the necessary harmony between Grace and Liberty, divine action and human action, between fate and free will, was led to believe that the development of society, like the human heart, must be subject to one constant, universal, and divine law, the variable application of which depended upon the unstable will of man. Thus minds happily gifted by nature find in all things an opportunity of improvement. And a geometrical dissertation on the doctrine of St. Augustine made Vico conceive the idea of a single universal principle in the natural law of nations. Vico now proceeded to an extended course of the ancient writers. Having read Aristotle, he thus characterized the distinction between Ethics and Jurisprudence. "Jurisprudence, which is, properly speaking, the art of Equity, and which rests on an infinity of minute precepts of natural justice discovered by jurisconsults in the reason of laws and the will of legislators, contains the explanation of laws by their determinate causes, and teaches the acknowledgment of their results in different social necessities. Moral philosophy teaches the science of the just, which proceeds from a small number of eternal truths dictated to metaphysics by an ideal justice, constitutive of states, the director of reparative justice and distributive justice, which regulate in their turn utilities or interests by means of two eternal measures, the arithmetic and geometric." Vico in his retirement pursued his studies; and he has left us interesting and valuable memoirs as to their subjects. The Stoic and Epicurean philosophy, the injurious effects of an exclusively mathematical education, the works of Bayle and Descartes, are all discussed by him. Returned to Naples he remained isolated and in poverty. Genius does not always suffice for itself, and he felt the want of some medium of com-

municating his ideas. In 1697, he obtained a professorship of Rhetoric, which, however, only brought him 100 crowns per annum. As yet he had adopted as masters only Plato and Tacitus. The former painted man as he came from the creative idea; the latter such as he was become by his own fault. One sought the true, the just, the good; the other the certain, the equitable, the useful. Vico perceived in Plato and Tacitus the representatives of the two epochs, the two civilizations, the two wisdoms, which later formed the subject of his New Science. A third philosopher was now studied by him, the great Chancellor, Lord Bacon. And he henceforth proposed to himself never to lose sight of these three great models. Vico was subjected to the wretched fate of men of letters under a despotic government. Dependent on the aristocracy, excluded from high political or military dignities, never essaying action, the domain of literature was in words,—its task to express them as well as possible. Vico, this fertile thinker, congratulated his good fortune whenever some illustrious personage came to interrupt his meditations upon eternal laws and commanded a discourse upon a given subject. Happy when he had only to celebrate the graces of a bride, his political eulogiums must be unsparingly condemned. Thus, after having branded with infamy the Austrian conspirators when their party was defeated, he, at the orders of Count Daun, overwhelmed them with eulogiums on their triumph. On the arrival and departure of all the Spanish Viceroys, he made long harangues in Latin, in which he compared these worthies to Cæsar, Cato, and Alexander. So his Life of Marshal Caraffa is a eulogium upon his conduct in the Hungarian war, where he committed atrocities which even the manners of that age did not excuse. We, in our own country, where the press, the universities, and the educated reading public afford full employment for men of letters,—whilst in France, political literature is the avenue to political power,—must look with indulgent compassion upon the weakness of Vico, living in Naples,

and writing early in the eighteenth century. And let us remember the complaint of Dryden, when he mourns that the talents which he knew to be given to him for the service of mankind, were, to earn his subsistence, wasted in writing lampoons and wanton plays for the amusement of the Court. Vico had held his professorship for twenty years. He had been working out a system of jurisprudence which, under the guidance of Christianity, should make the Platonic scheme of Justice harmonize with a philology founded on the knowledge of languages and history. In 1720 appeared the first book of the treatise De Constantiâ Jurisprudentiæ, under the title "De uno universi juris principio et fine uno." In this book the boldness and novelty of his views excited a multitude of angry opponents. He treated their antique doctrines with the same felicitous audacity which he displayed in his series of lectures on Homer. He showed that this poet, whose life so many writers had endeavoured to construct, who had caused so many chronological disputes, and excited the rivalry of all the cities of Greece, had never existed; that his poems so much admired were not poems; that those heroes so well known to all, represented by all sculptors and painters, sung by all poets, had never been real personages. It is a trifle to-day to deny the existence of any thing; but he who now would proclaim Napoleon a myth, would cause less sensation than Vico, a century ago, produced by denying Homer. This rashness, no doubt, was the cause of the check in life which he now experienced. In 1722 Vico applied for the Professorship of Jurisprudence, to which his talents undoubtedly entitled him. He was unsuccessful, and henceforth for ever renounced the hope of prosperity. In 1725 he published the celebrated treatise entitled "Principi di Una Scienza Nuova," the second edition of which in 1731 was honoured with the approbation of Cardinal Corsini, afterwards Clement XIII. Vico struggled all his life against misery, and struggled in vain; he could not obtain the place of secretary to the city, nor the

Professorship of Jurisprudence. Only in his declining years he was named historiographer to King Charles de Bourbon. Scarcely any bitterness was spared him; with the sufferings of his family he had to support the disdain of his cotemporaries. Poverty without glory, obscurity without wealth, was his lot. Such was the life of the most distinguished man of letters Naples has produced. He used himself to say that the age was opposed to him, and that Locke and Descartes conspired against the Christian philosopher. Indeed Vico, who considered monarchy as amongst the most perfect forms of government, and the One True Church as the principal safeguard against barbarism, could scarcely be tolerated by the negative philosophy of the eighteenth century. Vico plunged in misery and poverty died of a cancer in his 75th year: conscious he had faithfully worked his best in this life, and hopeful of the next, he departed from his worldly cares, repeating with his dying lips the Psalms of David.

If Vico, notwithstanding his extraordinary merits, be little known, the fault does not rest solely with posterity; nor has such neglect been caused by his opposition to the philosophy of the succeeding generation. Much is to be attributed to defects in his style. He was gifted with a prodigious memory, which had aided him to acquire an uncommon erudition. But this memory was injurious in causing him sometimes to dispense with documents. The very knowledge which he had accumulated produced a chaos. Although the author of a treatise on method, Vico himself did not know how to arrange his ideas after the order which gives clearness. He felt that the great novelty of his doctrines must excite astonishment and defiance. Proofs presented themselves in crowds to his mind, and rather than choose amongst them, he wearies himself and his readers in repeating them on every new occasion. This perpetual enumeration of ideas detached from one another renders his style immeasurably long, irregular, obscure, full of incidental phrases. His Italian is only a Neapolitan dialect united with the Latin—a language at the first glance difficult

except for a Latin scholar and a native of Naples. Vico also sometimes employs words in their ordinary signification, often in the particular signification suggested to him by their etymology. For these reasons Vico has been little read in Italy. Ferrari, in 1836, has published the first complete edition of the works of Vico. This is accompanied by notes explanatory of the text. It has been remarked on these notes, that we may now read Vico without comprehending him; but before M. Ferrari it was sometimes impossible to decipher his works.

In France, M. Michelet has translated some of Vico's works. But whether that the mannerism of Vico fatigued him, or that the vivacity of his mind did not harmonize with Vico's didactic style, the translation is by no means faithful. In 1822 the Scienza Nuova was translated into German by Weber. On this the French critic remarks that M. Weber merits no reproach. When he does not understand his author—a thing which often occurs—he resigns himself immediately; and reproduces faithfully in German the same obscurity which is found in the text; with this difference, nevertheless, that the author of the text understood himself, and that the translator did not. In 1845 another French translation appeared. Mr. Coleridge, in his Introduction to the Study of the Greek Classic Poets, has translated the third book of the Scienza Nuova, which treats of the discovery of the true Homer. With this exception no part of Vico has hitherto been translated into English. It has been foreign to my purpose to give more than an abstract of those portions of the New Science which treat of politics, jurisprudence, and the progress of civilization as connected with them. Following the French translations, I have attempted to arrange in logical order the subjects of Vico's involved sentences, which often ramble over a page. And I have suppressed incidental phrases such as etymological proofs, and other matters too often repeated. To some of his conclusions Vico was irresistibly conducted by the recent progress in physical science. After Kepler and the mathematicians of Pisa had found the formulas of the move-

ments of the physical world, the problem which naturally presented itself was to seek those of the civil world. If an eternal order govern the orbits of the stars, it must necessarily be met with in the successions of nations and states. Such was Vico's idea, a perpetual revolution of barbarism, liberty, power, wealth, corruption, barbarism. The originality of Vico has been traced to one single thought, the creator of all the others, that civilizations proceed from the idea of God, like rivers from their source. The day when Vico, after reading Grotius and seeking to resolve the problem of the origin of society, discovered that community amongst men arose from the thought of God, that day he found his science. Whilst the civilians, Grotius and Puffendorf, and later still even Rousseau, in their search after the origin of society, make every thing depend upon the first inventions of the mechanic arts, Vico leaps at one bound to the conception of God, and this thought being known, society is constituted. Vico sees, like Bossuet, that the civil world is submitted to the government of Providence; but he does not, like him, stop short at this general thought; he approaches much nearer to the living truth. To say that empires are moved by Divine ideas is to remain still in the abstractions of Plato. This is Vico's precise originality; it is that of which he is the least conscious; he identifies, unknown to himself, the Divine ideas, the warnings of Providence, with positive worship—with religions, which thus become, as it were, so many partial revelations of eternal wisdom, in the city of space and time.

Without entering into the metaphysics which Vico cultivated, let us review some of the prominent points of his social philosophy. Every society is an association grounded upon kindred. The natural sentiments of man bring him to associate with his fellows. The principles of this association are the desire of existence, the desire of knowledge, the shame of ignorance, good faith or equity—which is the relation of persons to things according to truth, or the retribution of persons by means of

things according to justice—the love of our fellow-men, or charity. These principles are themselves applications of a great universal principle—truth. In effect, if it is truth properly so called, which regulates the relations of man with himself, equity regulates the relations of men between one another. What is true for the spirit is good for the heart. The establishment of these principles and the satisfaction of these hearts constitute the natural liberty which is assured by natural law. This guarantees the free exercise of the thoughts; converts wants into rights; and preserves from danger by proper protection.

The want of existence in natural liberty becomes the right of existence in natural law. This right is composed of the right of property or dominion, and of the right of defence or protection. Dominion consists primitively in the right of using things common to all, as the running water, the air, the sea. It is the use of the result. Next comes the possession of the source itself; and this possession is constituted by occupation, which is not intended to acquire, but to point out. Occupancy is not the taking of possession; it is the designation of property. All commerce is derived from this first dominion, and exchanges are the objects of the first contracts.

The right of defence or of protection forms the second part of the right of existence. By this right man is authorized to employ violence in order to preserve his own life, or the lives of his children, his property, or that of his family. The word virtue—virtus—signifies the strength of resistance.

The right of knowledge is as precious to man as the right of existence, for all crimes proceed from ignorance. There are two kinds of ignorance; ignorance of the fact itself, as, for example, where Œdipus weds his mother without knowing her, and ignorance of the value of the fact. This again is subdivided into many species. Thus we may be ignorant that a law of a country which we inhabit forbids such an action; we may mistake the limits of good and evil; finally, we may be ignorant of our true

nature, and act conformably to instinct like the beasts. For all these species of ignorance up to the last exclusively, man bears his chastisement in his conscience, which makes him ashamed of having been ignorant of the truth. The true punishment prepared by God for guilty man is precisely in this unconquerable attraction of the truth, which prevents any one removing himself from it, and leaving himself unassisted. Punishment is but the auxiliary of shame and conscience. But he who knows not himself, not only is ignorant of the truth, but also of the wrong which he does in contesting it. For him without shame, without conscience, shall we say there is no punishment—nay, rather, the most terrible of punishments: a sort of banishment beyond the pale of humanity.

Good faith, or equity, imposes upon every one the obligation of not injuring his fellow-creatures, and of abstaining from the property of others. Good faith assures to man the right of existence, and all the rights which are corollaries to it.

Another fundamental law may be suited to a more advanced age than the present. This is the law of social love, which goes further than the law of equity. This regards all the exceptional necessities of human life, and converts them into rights. Thus, according to this law, every one is permitted to take what is absolutely indispensable, and for his own gain to make use of what does not belong to him, provided this be not done to the injury of the proprietor.

All these sentiments are different modes or different expressions of the eternal truth, for they are founded on truth itself, on equity which is an application of truth, and on charity which is an extension of equity. The science which assures the liberty of these sentiments, and the exercise of these rights, is Jurisprudence, which may be also termed the Science of Morality established according to the rules of Justice.

Having given this outline of Vico's general system, I may proceed to an analysis of the New Science.

The second New Science,[1] which I analyze here as the last resumé of Vico's philosophy, commences with a chronological table arranged after the three epochs of time according to the Egyptians, who considered the world as divided into three ages—of the Gods, of Heroes, and of Men. The first book is on the establishment of principles; and the first chapter is taken up with an explanation of this table. Vico then lays down certain axioms, or philosophical as well as philological sentences, and some definitions. Even as the blood is spread through the body which it animates, these truths should circulate in this science and vivify it, that it may enlighten us on the common nature of nations. The indefinite nature of the human mind is the reason that man plunged in ignorance makes of himself the rule of the universe.[2] It is from this truth that the two human tendencies are derived, thus expressed: *Fama crescit eundo* and *minuit præsentia fama.* Fame has run a long course from the beginning of the world, and it is during this journey that it has received opinions so extravagant and exaggerated on the epochs which are only imperfectly known to us. This disposition of the human mind is indicated by Tacitus in his life of Agricola, where he has said *omne ignotum pro magnifico est.*

There is another faculty belonging to the human mind, that when men cannot themselves form an idea of things because they are remote and unknown, they imagine them according to what is known and present.[3]

This truth points out to us the inexhaustible source of all the errors into which have fallen both nations and the learned on the subject of the origins of humanity; for they judged these after the times in which they commenced their researches, and these times were illustrations full of science and grandeur, whilst humanity had only petty, obscure, and rude origins.

[1] Principi di Scienza Nuova, di Giambattista Vico, e con note di Giuseppe Ferrari: Milan, 1836. La Science Nouvelle, par Vico, traduite par l'auteur de l'essai sur la formation du dogme Catholique: Paris, Charpentier, 1845.

[2] Works (Ferrari's edition), vol. v. p. 92. Scienza Nuova, Degli Elementi, i.

[3] Degli Elementi, ii.

In order to make its salutary influence felt on the human race, Philosophy ought to raise and support weak and fallen man, but should neither compress his nature, nor abandon it to its own corruption:—La Filosofia, per giovar al gener umano, dee sollevar e reggere l' uomo caduto e debole, non convellergli la natura, nè abbandonarlo nella sua corruzione.[1]

This axiom must remove us from the Stoics, who desire the mortification and annihilation of the senses, and from the Epicureans, who place their rule in the same senses. These two schools of philosophy equally deny Providence, which the first replaces by Destiny, the second by Chance. The philosophers also of this last school teach that our souls are mortal. We may designate them, as well as the Stoics, by the name of monastic or solitary philosophers. We will profit on the other hand by the labours of the political philosophers, and principally of the followers of Plato, who agree with all legislators in the three following articles, that is to say, in the existence of divine providence, in the necessity of moderating human passions, and transforming them into virtues, and, finally, in the immortality of the soul. It is then from this maxim that we derive the true principles of this science.

Philosophy considers man as he ought to be. It then can be useful only to the small number of those who would rather live in the Republic of Plato, than stagnate amidst the filth of Romulus.[2]

Legislation considers man such as he is, and endeavours to make a good use of him in human society. For this end it modifies the three vicious passions which distract all mankind, fierceness, avarice, ambition, and produces from them the army, commerce, and the court: that is to say, strength, wealth, and the knowledge of government. These three great vices, which suffice to destroy all human generations on this earth, become the source of civil felicity. This axiom demonstrates to us that there is a divine providence, or rather a divine

[1] Degli Elementi, v. [2] Ibid. vi.

legislative spirit, which from all the passions of men having been directed towards their proper utility,—from those very passions which could hurry away men to live in solitude and barbarism, has been able to derive that civil order by means of which human societies are formed.

Nothing out of its natural state can either easily subsist or last long:—Le cose fuori del loro stato naturale nè vi si adagiano, nè vi durano.[1]

When men cannot know what is true, they attempt to know what is certain; for not being able to satisfy their intelligence by knowledge, they strive to make their will repose on conscience.[2]

Philosophy contemplates reason, whence comes the science of truth: Philology observes the authority of human testimony, whence comes the consciousness of what is certain:[3]—La Filosofia contempla la ragione, onde viene la scienza del vero: la Filologia osserva l' autorita dell' umano arbitrio, onde viene la coscienza del certo.

The second part of this definition tells us that amongst philologists must be classed all grammarians, historians, and critics, who are occupied with the knowledge of languages, and the actions of different nations, whether internal, such as usages and laws, or external, such as wars, alliances, voyages, and commerce. The human will, in its nature most uncertain, can be strengthened and determined by the common sense of men towards the subject of human wants and necessities. These wants and necessities are the two sources of the natural law of nations.[4]

Common sense is the judgment without reflection commonly entertained by an entire class, an entire people, an entire nation, or the entire human race.[5]

Uniform ideas born simultaneously amongst entire nations unknown to one another, must have a common source of truth.[6]

[1] Degli Elementi, viii. [2] Ibid. ix. [3] Ibid. x.
[4] Ibid. xi. [5] Ibid. xii. [6] Ibid. xiii.

This axiom discloses the great principle that the common sense of mankind is nothing else than the criterion pointed out to nations by divine providence, by which they may know what is certain in the natural law of nations.

The nature of things consists only in their commencement at a certain time and under certain conditions. Such a time and such a condition form the nature of such a thing.[1]

The inseparable properties of things must have been caused by the modification or manner in which they have been produced; it is for this reason that we can know the origin or nature of things by means of the modifications which we see in them, that is to say, by means of their proper and inseparable qualities.[2]

The vulgar traditions must flow from a source generally recognised as true; that is to say, in possession of the confidence of men. It is by means of this confidence that traditions arise, and that they have been preserved by entire nations and during long periods of time. One of the principal ends of this science must be to find the true sources of the traditions which have come to us enveloped in falsehood and lies through so many ages, and so many changes of manners and languages.[3]

The common languages must be the most important evidences of the manners of a people, such as they were when the languages were formed.[4]

A language of the ancient nations which may have preserved itself dominant until it arrived at perfection must be a grand evidence of the manners of the early times of the world.[5]

This axiom renders very important in our eyes the philological proofs drawn from the Latin language on the natural law of nations,—del diritto naturale delle genti,—a science in which the Roman people excelled. The learned can use with the same advantage the Ger-

[1] Degli Elementi, xiv. [2] Ibid. xv. [3] Ibid. xvi.
[4] Ibid. xvii. [5] Ibid. xviii.

man language, which possesses the same quality peculiar to the ancient Roman tongue.[1]

If the laws of the XII. Tables were the customs of the people of Latium from the era of Saturn, and otherwise always fluctuating, but by the Roman people engraved on bronze and religiously preserved by the Roman jurisprudence, they would be a great testimony of the ancient natural law of the people of Latium.[2]

If the poems of Homer be the civil history of ancient Greek manners, they will be for us the great storehouses of the natural law of the nations of Greece.[3]

There must necessarily be in the nature of things a mental language common to all nations, which can uniformly designate the substance of the things which participate in human social life, and can mould itself to as many diverse qualifications as the things can have divers aspects. We see in effect the substance of proverbs, which are the maxims of vulgar science, is the same amongst all the ancient nations, and their aspect varies after the diverse modifications of these nations.[4]

The knowledge of this language pertains to this science. If the learned would condescend to employ their researches on it, they could compose a mental vocabulary common to all articulate languages, as well ancient as modern. Vico himself gave an attempt at this vocabulary in the first edition of the New Science.[5]

Vico then briefly sums up the result of the foregoing axioms, which we have translated. The first, second, third, and fourth give the means of refuting all the opinions received up to this time on the origin of human nations. These means are found in the improbability, absurdity, contradiction, and impossibility of such opinions. The propositions which follow from the fifth to the fifteenth give the foundations of truth, and will serve to make us contemplate the world of nations, in its eternal idea or in its type, by this property of all science indicated by Aristotle: Scientia debet esse de universalibus

[1] Degli Elementi, ibid. p. 100. [2] Ibid. xix. [3] Ibid. xx.
[4] Ibid. xxii. [5] Ibid. p. 103.

et æternis. The last axioms from the fifteenth to the twenty-second give us the foundations of what is certain, and will serve to recognise, after facts, the world of nations, such as we have determined it in idea, according to the philosophic method of Bacon, that is to say, in taking as the point of departure natural things, on which he wrote his book cogitata visa, and in applying his method to human and civil things.

Proofs are then adduced by Vico to show that the world of nations commenced by religions. And this is stated to be the first principle of the three upon which the New Science is founded.[1]

When nations are rendered savage by war, so that human laws can no longer be respected by them, the only power capable of subjugating them is religion.[2]

This axiom displays to us how, in the state of barbarism, divine providence arranged violent and terrible means wherewith to conduct to civilization, and organize nations, awaking thus amongst those nations a confused idea of the divinity, which they applied falsely by reason of their ignorance, but which, by the terror of such a divinity being imagined, served nevertheless to bring them to a certain order.

When men are ignorant of the natural causes of things, and when they cannot render even approximately an account by comparison of similar things, of which their causes are known, they attribute to things their own nature. As the people, for example, say:—la calamita esser innamorata del ferro.[3]

This axiom is only a result of the first; that is to say, that when the human mind, whose nature is indefinite, finds itself plunged in ignorance, it makes itself the rule of the universe.

The Physics of the ignorant are but vulgar Metaphysics, by which they attribute to the will of God the cause of the things they are ignorant of, without considering the means employed by the divine will:—La

[1] Degli Elementi, Works, vol. v. p. 106.
[2] Ibid. xxxi.
[3] Ibid. xxxii.

Fisica degl' ignoranti è una volgar Metafisica, con la quale rendono le cagioni delle cose ch' ignorano, alla volontà di Dio, senza considerare i mezzi de' quali la volontà divina si serve.[1]

A quality proper to human nature has been pointed out by Tacitus, when he says—Mobiles ad superstitionem perculsæ semel mentes; that is to say, that men, struck by the terrors of superstition, refer to it the cause of all that they imagine, or see. Astonishment is born of ignorance; and imagination is more vigorous as reason is more weak.[2]

The most sublime result of poetry is to give to insensible and inanimate things senses and passions. It is a property peculiar to children to take in their hands senseless things, and to play with them, talking to them as they would with living beings. This philologico-philosophical axiom teaches us that in the infancy of the world men were naturally poets.[3]

There is a golden saying of Lactantius, in speaking of the origins of idolatry:—Rudes initio homines deos appellarunt sive ob miraculum virtutis (hoc vero putabant rudes adhuc et simplices) sive, ut fieri solet, in admirationem præsentis potentiæ; sive ob beneficia quibus erant ad humanitatem compositi.[4]

Curiosity is a faculty proper to human nature. It is the daughter of ignorance, and becomes the mother of science. It proceeds thus: after an extraordinary effect, such as a comet, a parhelion or star in midday, has arrested its attention, it seeks immediately what such a thing may signify.[5]

Sorcerers have always been wicked and barbarous; for it is told that to celebrate the mysteries of their sorceries they have not recoiled from all sorts of cruelties, even the murdering of unhappy children![6]

"The foregoing axioms," says Vico, "explain the origins of divine poetry, or of poetical theology, the origins of idolatry, of divination, and of the sacrifices commanded

[1] Degli Elementi, xxxiii. [2] Ibid. xxxiv.–xxxvi. [3] Ibid. xxxvii.
[4] Ibid. xxxviii. [5] Ibid. xxxix. [6] Ibid. xl.

by sanguinary religions. The human and other sacrifices of the early nations give us the explanation of this sentence—'*Primus in orbe Deos fecit timor*;' that is to say, that false religions were not alone founded by the imposture of some, but by the credulity of all."[1]

Some topics are then discussed connected with the origin of written and spoken language. And he maintains that in the annals of the Roman empire and of the preceding heroic times, are to be found some of the principles of eternal history, by which it is possible to show all nations marching with an uniform step in their birth, progress, establishment, decline and fall.[2]

Governors should conform to the nature of the governed; which axiom shows us that, by the nature of human and civil things, the manners of the people should be the public school of princes. "I governi debbon essere conformi alla natura degli uomini governati. Questa degnità dimostra che per natura di cose umane civili la scuola pubblica de principi e la morale de popoli."[3]

Vico next treats of the origin of different species of government. The subject is somewhat embarrassed by mythological allusions and philological learning, in some instances not quite sound.

He cites, with approbation, the definition given by Ulpian of civil equity: "Probabilis quædam ratio non omnibus hominibus naturaliter cognita, sed paucis tantum, qui prudentiâ, usu, doctrinâ præditi, didicerunt quæ ad societatis humanæ conversationem sunt necessaria."[4] Certainty in laws is the obscurity of reason removed by authority: it is on this account that the practice of laws seems to us harsh; and, nevertheless, we are obliged to practise them in their certainty, a word which signifies, in Latin, particularity, or as the schools say, individuality.[5]

This proposition, with the two following definitions, constitutes the principle of strict reason, which has for

[1] Degli Elementi, xl. Works, vol. v. p. 109.
[2] Ibid. lxviii.
[3] Ibid. lxix.
[4] Ibid. cx.
[5] Ibid. cxi.

its rule civil equity; it is with the certainty of this civil equity, or with the particular determination of these words, that barbarians content themselves naturally; and it is after this that they determine their law. Ulpian says often—"Lex dura est, sed scripta est;" but we can say, in more elegant Latinity, and with a more appropriate signification—"Lex dura est, sed certa est."[1]

Wise men define Right as all that is necessary for the just utility of things—"Gli uomini intelligenti stimano diritto tutto cio che detta essa uguale utilita delle cause."[2]

Truth in laws is a shining light which illustrates natural reason; this is the reason why the jurisconsults say indifferently, *verum est*, or *æquum est*.[3]

This definition, as well as the cxith, are particular propositions that furnish us with proofs for the particular subject of the natural law of nations, which we propose to treat of. They are derived from the two general propositions contained in axioms ix. and x. where the question is of the true and certain.

The natural equity of human reason entirely displayed, is but the exercise of knowledge in the domain of utility; for wisdom in all her grandeur is but the knowledge of using things according to their nature.—"L'equità naturale della ragion umana tutta spiegata è una pratica della sapienza nelle facende dell' utilità: poichè Sapienza nell' ampiezza sua altro non è che scienza di far uso delle cose, qual esse hanno in natura."[4]

These axioms, says Vico, give us the principle of beneficent reason regulated by natural equity. And all these six last propositions establish that Providence has been the ordainer of the natural law of nations. Knowing that nations must live during many ages without knowing the truth, or the natural equity of which philosophers later make the discovery, Providence has permitted nations to observe certainty and civil equity,

[1] Degli Elementi, Works, vol. v. p. 136.

[2] Ibid. lib. i. axiom exii. This definition is rendered by the French translator thus:—"tout ce qui est nécessaire pour la distribution équitable de l'utilité."

[3] Degli Elementi, axiom exii'.

[4] Degli Elementi, axiom exiv.

scrupulous guardians of the language of the laws: Providence has permitted that these laws should be generally observed even whilst their observance has appeared severe, for thus was the preservation of nations assured.[1]

The fact of these propositions being unknown to the three chiefs of the doctrine of the natural law of nations —Grotius, Selden, and Puffendorf—has caused the error into which they have fallen in establishing their systems; because they believe that natural equity in its most exalted idea was understood by the pagan nations from their origin, whereas two thousand years elapsed before the philosophers arose. For they had not amongst them a people peculiarly assisted by the true God.

Vico then attempts to show that the successful study of the social science is easier than that of the natural sciences. The civil world has certainly been made by men—"questo mondo civile eglé certamente è statto fatto dagi uomini." It is then possible—for it ought to be done—to discover the principles of it in the modifications of the human mind. He then states his astonishment at philosophers attempting to discover the science of the natural world, for God alone, who made it, knows and possesses its law; whilst the same philosophers neglect to meditate on the world of nations, or the civil world; and nevertheless this, being made by men, could be known and explained by human science. This sentiment of Vico is borrowed from Plato, and it is unnecessary to do more than point out its erroneousness.[2]

"Since then," says our author, "it is true that the world of nations has been made by men, let us see what are the things upon which all men always have been found to agree, and still agree." The knowledge of these things may indicate to us the universal and eternal principles after which all nations arise and are preserved. We may observe, then, that all nations, barbarous or civilized, separated by time and space, observe the three following human customs:—All have a religion; all solemnly contract marriages; all bury their dead. Amongst the most

[1] Scienza Nuova, Works, vol. v. p. 137. [2] Ibid. p. 139.

savage and the most cruel nations there is no human act celebrated with more pomp and solemnity than religious ceremonies, marriages, and interments. In the preceding aphorisms it was laid down that uniform ideas originated amongst people who knew not one another, must have a common principle of truth. Something has without doubt taught all nations these three origins of civilization, and all must religiously observe these customs, that the world may not again become barbarous. This is the reason which led Vico to consider these three eternal and universal customs, and to make them the three first principles of this science.

Each of these propositions is supported by historical proofs, although Vico appears to forget that the most civilized nations for a long time burned not buried their dead. "It is with reason," says Vico, "that interments have been named *Fœdera humani generis*, and that Tacitus has called them, with less grandeur, *humanitatis commercia*." It is besides an opinion, in which all the Gentile nations have agreed, that souls remained unquiet upon the earth whilst their bodies were without sepulture. All then have believed that the soul did not die with the body, but was immortal. Finally, on this subject the conclusion of Seneca may be quoted:—

"When we speak of immortality, the consent of mankind in fearing or worshipping the shades has no light weight with us: I use the public conviction."—"Quum de immortalitate loquimur non leve momentum apud nos habet consensus hominum aut timentium inferos aut colentium: hâc persuasione publicâ utor."[1]

Vico concludes the first book of the New Science by a chapter on the method of his work.

This science, as has been laid down in the Aphorisms, must commence with the subject or matter of which it treats. Philologists have sought its elements in the stories of Deucalion and Pyrrha, in those of Amphion, in the Cadmus' men born of furrows, or in the oaks of Virgil; Philosophers in the grass of Epicurus, the grass-

[1] Scienza Nuova, Works, vol. v. p. 144.

hoppers of Hobbes, the idiots of Grotius, and in men such as Puffendorf has described, as thrown on the world without the care or aid of God. But we must commence to inquire whence the human mind began to think. Men in their savage state can be drawn from barbarism only by a terrifying idea of the Divinity. The fear of God is the only means of bridling their ferocious liberty. Vico says, that in order to find the way in which this first human thought must have presented itself to the Gentiles, he devoetd himself for twenty years to painful researches. In order to attain the proposed end, it is necessary to find an idea of God, such as men, although savage, fierce, and cruel, may not be deprived of. This idea of God can thus be explained. Men despairing of all natural assistance capable of saving them, seek to rest on something superior to nature. This thing superior to nature is God.

But the first men, who later became the princes of the Gentile nations, must have had a spirit troubled and agitated by very violent passions, that is to say, by brutal passions. We will be obliged, then, in order to find the origin of the terrifying image of the Divinity, which checks the passions of men, and renders them human from being brutal—we will be forced, says Vico, to have recourse to vulgar metaphysics such as indicated in the Aphorisms, metaphysics which were also the theology of the poets. It is from this thought of terror that effort is born, a faculty proper to the human will, by means of which the wise man and the citizen put a check upon the emotions impressed by the body on the mind, whether the will rules completely, as with the wise man, or gives the emotions a better direction, as with the citizen. This power of checking the movements of the body is certainly the result of the liberty of the human disposition, and of free will, which is the domicile and abode of all the virtues, and especially justice; for the will, instructed in all that is just, determines all right.

But the corrupt nature of men permits self-love to tyrannize over them, and draws them exclusively towards

their particular advantage. Hence Vico lays down that man, in the savage state, regards only his own safety. Later, he takes a wife; he has children; he loves his own safety along with that of the family; arrived at the state of citizen life, he loves his own safety along with the safety of the State; when empire is extended over many nations, he loves his own safety along with that of the nations; when nations are united in war, peace, alliance, and commerce, man loves the human race. In all these different circumstances man is chiefly occupied with his own advantage; but he is conducted by Divine Providence through successive developments, to maintain, with justice, the state of the family, the civil society, and finally the society of mankind; by means of which ordainment Man, not being able to attain what he wishes, is willing to content himself with utility,—that is to say, with what is just.[1]

Hence the New Science, in one of its principal aspects, must be a civil and ratiocinated Theology of Divine Providence—"una Teologia civile ragionata della Providenza Divina"—which seems to be still wanting. For it is yet unknown to philosophers, such as the Stoics and Epicureans; some of whom say that a blind concourse of atoms agitates, some that an invisible chain of causes and effects draws the affairs of men. Whence Natural Theology is called Metaphysics. In which respect alone they contemplate this attribute of God, and try to demonstrate it by the physical order which they observe in the motions of bodies, and considering, at length, Providence as the final cause of the other natural phenomena which they have remarked. And, nevertheless, with regard to the economy of civil things, they ought to consider, with all propriety, the term itself, since Providence has been called Divinity, from *divinari*, to divine; that is to say, to understand the things unknown to men, such as the future, or the things hidden in men, such as conscience. And what properly occupies the first and principal part of the science of Jurisprudence, are divine

[1] Scienza Nuova, Works, vol. v. p. 149.

things, on which depends the second part, its complement, which are human things. This science should, therefore, be a demonstration of Providence as an historic fact; for it should be the history of the laws which Providence has given to the great society of mankind, without the assent or advice, and often in a manner opposed to the projects of men. For although this world has been created in time and space,[1] the laws by which it is governed are universal and eternal.[2]

In the contemplation of an infinite and eternal Providence this science finds certain Divine proofs which confirm and demonstrate it. For Divine Providence having for its servant omnipotence, must explain its laws by ways which are as easy as the natural manners of man: having for a counsellor infinite wisdom, it must dispose all in perfect order; having for an end its own great goodness, it must direct its work towards a greater and more perfect good than that which men have proposed to themselves. Throughout all the deplorable obscurity of the commencement, and the innumerable variety of the customs of nations, what more sublime proofs could we desire on the Divine argument which contains all human things, than in the nature and order of events, and their end, which is the preservation of the human race. These proofs will appear luminous and distinct if we reflect with what facility, and on what occasions, events arise, which, from the most remote distances, and contrary to all human foresight, take their assigned places. Such are the proofs of Omnipotence. We must then combine them, and see how things arise in the time and place suitable for them, and how others wait to spring forth in their turn, which constitutes, according to Horace, all the beauty of order. We must acknowledge in these facts the proofs in favour of eternal wisdom. Let us consider, finally, as well as we have the capacity of attention, if any other Divine benefits could be produced in place of those which we have received on the occasions and at the time when these events have

[1] Particolare—dans l'espace. [2] Scienza Nuova, Works, vol. v. p. 148.

happened; and acknowledge that nothing could more contribute to the satisfaction of men, or turn aside from them the evils with which they are menaced; and behold what are the proofs which have been given of the eternal goodness of God. Now the continued proof, which Vico undertakes to present in the Scienza Nuova, of the direction of the affairs of the world by Providence, consists in this, that the human mind cannot find in the series of possible things which it is permitted us to understand, any other causes for the effects of the Civil World. In doing this, the reader will experience in his own person a Divine satisfaction by the contemplation of this world of nations, through all the distance of places, and the variety of time. He will be able to convince the Epicureans that their Chance cannot err blindly and without rule, and the Stoics that their Eternal Chain of causes by which the world is held, is linked to the all-powerful, wise, and beneficent rule of a God supremely good and great.[1]

In order to discover the nature of human things, this science proceeds by a severe analysis of human reflection on human necessities, and on the utility of the social life, the two inexhaustible sources of the natural law of nations;—"i due fonti perenni del diritto naturale delle genti."

In considering it under this aspect, this science may be called the history of human ideas, after which, it seems, ought to come the metaphysics of the human mind. This science Vico designates the queen of sciences, for, as the sciences should commence where the matter and subject of which they treat commence, this science will commence in effect with the first thoughts of the first men, and not with the first reflections of philosophers on human ideas.[2]

In order to determine the times and places where the events of this history arose,—that is to say, in order to determine the epoch and country of human thoughts, and to supply this history with chronological, geogra-

[1] Scienza Nuova, Works, vol. v. p. 149. [2] Ibid. p. 150.

phical, and metaphysical proofs, this science employs a critical and metaphysical art in the search for the authors of nations. The historians of nations, with whom philological criticism is occupied up to the present time, come a thousand years later. The criterion which serves for this science is that already indicated in the Aphorisms, and which has been given to all nations by Divine Providence; it is the common sense of the human race which is determined by the conscience and the necessity of human things, which conscience and necessity form the whole beauty of this Civil World. In support of this science, there will be found this sort of proof,—that is to say, that the laws of Divine Providence being once established, the progress of nations cannot be different from that which it has been in reality, if even infinite worlds should yet arise out of eternity. This science, at the same time, will describe an ideal eternal history, in which all nations will march with an equal step, during their progress, their decline, and their fall. Vico affirms yet more; for this world of nations having been made for man, man can find the modifications of it in his own mind; in such fashion that he who meditates on this science may, by means of this formula, MIGHT, OUGHT, and SHOULD, relate to himself this history.[1]

This science then proceeds, says Vico, like Geometry, which of itself creates a world of greatness, in constructing it with its own elements; but with so much the more reality, as the regulations about all things to be done by men were beyond points, lines, surfaces, and figures.

In the definitions of the True and Certain, it was above laid down, that men were not for a long time capable of understanding truth or reason, which are the fountains of eternal justice, and satisfy the intellect of man. This was practised by the Hebrews, who, enlightened by the true God, were prohibited by his Divine law from unjust thoughts. With this no mortal legislator embarrassed himself. For the Jews believed in a God, all mind, who penetrated the heart of man,—"in un Dio,

[1] Scienza Nuova, Works, vol. v. p. 151.

tutto mente, che spia nel cuor degli uomini :"—but the Gentiles believed in Gods formed of mind and body. Philosophers who have treated of this came two thousand years after the foundation of nations. During this time men were governed by the certainty of authority,—that is to say, by the very criterion which critical metaphysics employ ; or, better still, by the common sense of mankind, on which reposes the conscience of all nations. Viewed in this way, this science may equally be called the philosophy of authority, which the moral theologians consider as the science of external justice, on which authority must rest the three principal writers on the natural law of nations,—and not on what is drawn from the writings of historians. For the historians could not know the authority which governed nations more than a thousand years before their appearance.[1]

These, then, says Vico, are the philosophical proofs to be employed in the demonstration of this science, and absolutely necessary to all who wish to meditate on it. The philological proofs came afterwards, and are reduced to the following :—

First; that the mythologies, not distorted but in their natural sense, must be the civil histories of the early nations : these are naturally found amongst the poets.

Secondly; the heroic phrases, which are rendered with all fidelity of sentiment and all their propriety of expression.

Thirdly ; the etymology of the primitive languages, which narrate the histories of the things which the words signify, commencing with the peculiarity of their origin, pursuing the natural progress of their changes of meaning, according to the order of the ideas after which the history of languages must proceed.

Fourthly; a mental vocabulary of human and social things, of which the substance is the same in all nations, but expressed through different modifications in different languages.

Fifthly; the false is separated from the true in all

[1] Scienza Nuova, Works, vol. v. p. 152.

that through the long course of ages has been preserved by the vulgar traditions; for as has been observed in the Aphorisms, things preserved by entire nations and lasting many ages, must rest on a foundation of truth.

Sixthly; the grand ruins of antiquity, useless until this science, because they remained squalid, broken, and displaced, will throw a great light when they are polished, arranged, and set in their proper places.

Seventhly; upon all these things, as their necessary causes, are arranged all the results which certain history relates; all these philological proofs will serve to display to us, in fact, the things of which our meditations have given us the idea on the subject of this world of nations; following in this the philosophy of Lord Bacon, which is *cogitare, videre;* whence the philosophical proofs preceding the philological, authority will be confirmed by reason, and reason by authority.

Vico then recapitulates what he has said upon the establishment of the principles of this science. Since these principles are Divine Providence, the moderation of the passions by marriage, and the belief in the immortality of the human soul attested by interments; and since the criterion which the science employs, namely, that which is felt to be just by all or the greater part of men, must be the rule of social life; in which principles and criterion agree the vulgar wisdom of all legislators, and the recondite wisdom of the most famous philosophers: here must be the bounds of human reason: whoever wishes to pass beyond such bounds must take heed not to pass beyond all humanity.[1]

The second book of the Scienza Nuova is on the Poetic Wisdom. It is almost entirely critical; and there are only portions of it suitable to digest for our purpose. Wisdom is defined as the faculty which directs all the methods by which are learned the sciences and arts which compose Civilization. "Ella è sapienza la facultà che commanda a tutte le discipline, dalle quali s'apprendono tutte le scienze e l'arti che compiono l' umanità."[2]

[1] Scienza Nuova, lib. i. finis. [2] Ibid., lib. ii., Works, vol. v. p. 158.

We must let Vico tell in his own words his proposition and classification of the poetical wisdom. Metaphysics is a sublime science, which has effected for the secondary sciences the division of the subject matters, which it belongs to them to treat of. The wisdom of the ancients was that of the theological poets, who without doubt were the first wise men of the Pagans. But the origins of things must have been rude: we must therefore make the poetic wisdom commence by a rude sort of Metaphysics; from which, as from the trunk of a tree, will proceed on the one side Logic, Morality, Economy, and Politics, as described by the poets; on the other, Physics, —whence Cosmography and Astronomy, which in their turn produce Chronology and Geography.

Vico then proposes to show how the founders of the Pagan civilization imagined to themselves their Gods, by means of their Natural Theology and their Metaphysics; how, by means of their Logic they formed languages; by means of their Morality, created heroes; by their Economy, families; by their Politics, cities; by their Physics, established the principles of divine things. Thus the New Science is the history at once of the ideas, the manners, and the actions of the human race. From this threefold history arise the principles of the history of human nature,—the same with the principles of universal history.[2]

Treating the subject in this manner, Vico then discusses the universal deluge, the giants, the origin of poetry, idolatry, divination, and sacrifices. Many ingenious observations are made, interspersed with fanciful and absurd derivations, upon the origin of hieroglyphics, laws, money, the first language and literature of the natural law of nations. And from a comprehensive review of ancient history, sacred and profane, is deduced the corollary that Providence is the organizer of states and of the natural laws of nations.

The first governments were theocratical; the second heroic. The traces of the so-called ages of the Gods

[1] La perfectonatrice. [2] Scienza Nuova, lib. ii., Works, vol. v. p. 163.

were prolonged into the succeeding heroic age, in the same way as the freshness of the waters of a mighty river is preserved long after the river and the sea are intermingled. Divine Providence brought men to fear a divinity, and submit to religion,—the only source of civilization. The first idea which men conceived of the Divinity arrested them in their uncertain wanderings, and fixed them in the first habitable lands,—an event which must be considered as the origin of all territorial dominion. The strongest stopped in the elevated places which united the three conditions necessary for the establishment of towns,—the facility of being fortified, the salubrity of the air, and the abundance of water. Still employing religion as an instrument, Providence disposed men to unite themselves to women by the ties of marriage—the source of all rights. Hence families and states arose. Scarcely were these asylums formed when clients appeared; and the materials being ready, they were employed by the first agrarian law which founded cities on two classes of inhabitants,—the nobles and plebeians. Providence willed that the first states should be admitted to the aristocratic régime, because that this form of government has for its end the preservation of things in the state in which they are, and which species of immobility can alone make men lose the customs of brutish life. Thus four elements concur in giving the impulse to civilization, namely, religion, marriage, the institution of asylums, and the first agrarian law.[1]

The third book of the Scienza Nuova is on the discovery of the true Homer. Vico proves that Homer was the ideal or heroic character of the Greek people, relating its own history in national poetry. If the people of Greece contended amongst themselves for the honour of having given birth to him, and if all claimed him as a citizen, it was because they were themselves Homer. If there was such a diversity of opinion as to the time in which he lived, it was because he lived in

[1] Scienza Nuova, lib. ii., Works, vol. v. p. 361.

the mouths and memories of the same people from the Trojan war to the age of Numa,—about 460 years. Vico adds as the last praise of the poems of Homer, that they are the most ancient histories of paganism which have descended to us. His poems are two great treasure-houses, in which the manners of the first ages of Greece are preserved. But the lot of the Homeric poems has been similar to that of the laws of the XII Tables. On the one hand, the world has ascribed those laws to the Athenian legislator, from whom it is said they passed to Rome, whilst no one has seen in them the history of the common law of the heroic tribes of Latium; on the other, the world has believed the poems of Homer to have been the work of the rare genius of an individual, instead of discovering in them the history of the common law of the heroic people of Greece.

The fourth book is on the progress of nations,—"del corso che fanno le nazioni." He briefly recapitulates. In the first book were established the principles of this science; in the second, the origins of all human and divine things discovered by the Gentile nations within the poetic wisdom; in the third book, the poems of Homer were discovered to be the two great treasures of the natural law of the Greek nations, as the laws of the XII Tables afford the strongest evidence of the natural law of the nations of Latium. In the fourth book, Vico proposes, with the aid of philosophy and philology in continuation of the axioms upon ideal-eternal history, to illustrate the progress of nations, proceeding with constant uniformity according to the division into three ages which the Egyptians established,—that of Gods, of Heroes, and of Men. Whence, says Vico, amongst all nations there are three species of natures: from these arise three species of customs; these produce three species of the natural laws of nations; and these, three species of civil states, or governments. To communicate these, there are formed three species of languages, and three species of characters; then to regulate these, three species of jurisprudences, assisted by three species

of authorities, three species of reasons, three species of judgments.[1]

These three special unities, uniting in themselves many others, will end in one general unity,—the unity of the religion of Divine Providence,—the unity of a spirit that gives form and life to this world of nations.[2]

The first nature, by a vigorous error of fancy, was a poetic or creative, or, if we may use the expression, a divine nature; for after its own ideas, it transforms bodies into substances animated by deities. This was the nature of the theologic poets, the most ancient sages of all the Gentile nations. Otherwise the nature of these nations was savage and cruel; but, governed by the error of their imagination, they feared the very Gods which they themselves had created. Here is the origin of two eternal truths; that religion is the only means sufficiently powerful to conquer the barbarism of nations, and that religions produce their effect, when those who teach them believe in them. The second nature was the heroic nature, to which the heroes attributed a divine origin. Imagining, in effect, that all was the work of the Gods, the heroes concluded that they themselves, engendered under the auspices of Jupiter, were the children of this God; and they with justice placed natural nobility in this descent. The heroes considered themselves, then, as the princes of humanity, despising others. The third nature is intelligent, modest, benign, and reasonable, consequently obedient to the law of conscience, reason, and duty.

Of the three species of manners, the first were filled with piety, as we see in the story of Deucalion and Pyrrha; the second were violent and rude, as we see in Achilles; the third were gentle, and regulated by the obligation of civil duty.[3]

The first system of law—il primo diritto—has been divine, during which men believed that they and their property were under the jurisdiction of the Gods—by reason of their belief that all things were either deities

[1] Scienza Nuova, lib. iv., Works, vol. v. p. 500. [2] Ibid. [3] Ibid. p. 502.

or made by them. The second was the heroic system, or that of force, regulated, however, by religion, which alone was able to restrain force that human laws availed not to restrain. Such a law of force was that of Achilles, who placed all reason on the point of his lance. The third is human law, dictated by human reason all unfolded.[1]

Of the three species of governments, the first were divine, which the Greeks called theocratic, under which men believed that the Gods commanded every thing. The second have been the heroic or aristocratic governments, which signifies the government of the strongest. Such, in Greece, was the government of the Heracleidæ, or race of Hercules, which, spread over all ancient Greece, lasted the longest in Sparta. Such were the governments of the Curetes, whom the Greeks observed dispersed over Saturnia, or ancient Italy, Crete, and Asia. Such was the government of the Quirites at Rome—armed priests in public assemblies. In these, by the distinction of the more noble natures, because they were believed of divine origin, all civil right was reserved to the reigning orders of heroes; whilst the plebeians, reputed as of bestial origin, were permitted only to enjoy life and natural liberty. The third are human governments, in which, by the equality of human intelligence—which is the essential nature of man—all are equal before the law.[2]

There are three species of languages, of which the first was one divine mental language, by means of silent religious acts, or grand ceremonies, whence there remained in the civil law of the Romans the acti legitimi,[3] by means of which the Romans regulated all their affairs of civil utility, which language suits with constant propriety all the religions which require to be respected rather than understood, and it was necessary to the earliest times, when men knew not yet how to articulate language. The second language was by heroic deeds. This remains still in military discipline. The third is

[1] Scienza Nuova, lib. iv. Works, vol. v. p. 502.
[2] Ibid. p. 503.
[3] Actiones legis.

by means of articulate words which all new nations now employ.[1]

There are three species of characters. Of these the first were divine, which properly are called hieroglyphic. These all nations used at first. They were certain fantastic universals, dictated by the innate property of the human mind to delight in uniformity. Men were incapable of making an abstraction by genera; with the aid of imagination they made it by portraits; to which poetical universals they reduced all the particular species belonging to each genus: as to Jove they attributed all that concerns auspices, to Juno all relating to marriage. The second were the heroic characters, to which they referred the various species of heroic things; as to Achilles all the deeds of strong combatants, to Ulysses all the counsels of the wise. These fantastic genera, when the human mind was able to abstract the forms and properties of subjects, passed into intelligible genera. Finally there appeared vulgar characters, which went in company with the vulgar languages. For these were composed of words, which are, as it were, the genera of particulars, with which the heroic languages had at first been spoken; as, for example, of the heroic phrase, *my blood boils in my veins*, they made this phrase, *I am angry;* as out of the hundred thousand hieroglyphics which, for example, the Chinese use, they made a few letters. This labour of the intellect certainly appears more than human. Such languages and such letters must be in the possession of the common people, whence they must be both one and other common. By such possession of languages and letters, free nations must be masters of their laws.—Per tal signoria di volgari lettere e linque è necessario per ordine di civil natura che le repubbliche libere popolori abbiano preceduto alle monarchie.[2]

There are three species of Jurisprudences. The first was a divine science, or mystic theology. Such a Jurisprudence estimated the Just solely according to the solemnity of divine ceremonies; whence ensued amongst

[1] Scienza Nuova, lib. iv. Works, vol. v. p. 504. [2] Ibid. p. 506.

the Romans the superstitious regard for the *acti legitimi*, or formulas of the laws; and hence the phrases *justæ nuptiæ*, *justum testamentum* were applied to marriage and a solemn will. The second was the Heroic Jurisprudence, composed of cautious forms with certain appropriate words. Such was the wisdom of Ulysses, who, according to Homer, always speaks so craftily as to attain his proposed end, preserving, nevertheless, the propriety of his words. Thus all the skill of the Roman jurisconsults was expressed in the word *cavere*. And what they termed *de jure respondere* was nothing but advice given to those who went to law, to the end that they should present the facts in such a fashion that the formulas of actions might agree with them, so that the Prætor could not refuse them. Similarly on the return of the barbarous times all the skill of the doctors consisted in finding precautionary forms for the assurance of contracts and wills, and the means to elude them. The third is Human Jurisprudence, which considers the truth of facts, and benignly modifies legal right with all that equity demands. Whilst the Divine and the Heroic Jurisprudences aim at what is certain in the periods of barbarism, Human Jurisprudence considers what is true in the time of civilization.

There are three species of authorities—the first, divine; the second, heroic, contained entirely in solemn formulas of the laws; the third, human, placed on the credit of tried persons of singular experience in action, and profound wisdom in theory.[1]

There are three species of reasons or fundamental laws.[2] The first was the Divine law, which God alone understood, and of which men know as much as has been revealed to the Jews first, and to the Christians afterwards. The second embodied the principles of statesmanship, called by the Romans *civilis æquitas*. This Ulpian has defined as not naturally known to all men, but to a few practised in government, and who know what pertains to the preservation of the human

[1] Scienza Nuova, Works, vol. v. p. 509. [2] Ragioni, tr. droits.

race. The heroic senates were composed of sages of this kind; above all the Roman Senate in the times of aristocratic liberty. It seems difficult to explain how in the period when the Roman people was in a state of barbarism, there were the ablest statesmen; but in their enlightened times, says Ulpian, there were few skilled in government. Still by the natural causes which produced the heroism of the first natives, the Romans naturally observed the civil equity, which was most scrupulous of words. They kept to the strict law by all means, even though it were severe, harsh, and cruel. And civil equity naturally submitted every thing to this law, the queen of all the others, as Cicero said—suprema lex salus populi esto. For in the heroic times, when the states were aristocratic, the heroes had each privately a great part of the public advantage, which preserved to them the government of their families.[1] And by reason of this great particular interest being preserved to them by the state, they postponed the consideration of their lesser private interests. But in human times there is this difference between free popular and monarchical states. In the first the citizens preside over the public good, which is the good of all individually; in the second the subjects, commanded to attend to their private interests, leave the care of the public to the sovereign prince. The natural causes which have produced such forms of government are entirely opposed to those which have produced heroism, which Vico has already demonstrated to be the desire of ease, paternal tenderness, the love of women and the desire for the married state, and the love of life.

Now men are naturally borne to consider the ultimate circumstances of facts, which form the aggregate of their private interests. This is the *æquum bonum*, considered as the third species of fundamental law. This is natural reason, which the jurisconsults call natural equity. The multitude is alone capable of it, because they consider the ultimate motives of justice in individual cases. Mon-

[1] Le monarchie famigliari.

archies require only a few statesmen, to reconcile with civil equity the public emergencies of cabinets, and a very great number of jurists skilled in the principles of private justice to administer laws to the people.[1]

What has been laid down as to the three species of reasons, or fundamental laws, must be the foundation on which to establish the history of the Roman law. For governments must be conformable to the nature of the governed,—"perchè i governi debbon esser conformi alla natura degli uomini governati." And laws must be administered in conformity with the government, and interpreted after this form. This the jurisconsults and interpreters do not appear always to have done. They have told us what the laws commanded in various times of the republic, but not the relations which those laws had with the state. If we ask these decorators of Roman history why the ancient jurisprudence made so rigorous an application of the laws of the XII Tables; why in the second stage this was tempered by the edicts of the Prætor, still preserving respect for the ancient laws; why the new jurisprudence absolutely professed natural equity; they will reply that the rigour, the solemnities, the technicalities, the subtleties of words, and finally the secrecy of the laws, were the impositions of the nobles, to keep in their own hands the laws, and the consequent authority. But so far were these things, says Vico, from being the result of imposture, that they were the natural customs which produced such states,—the only forms of government then practicable. For during the greatest barbarism of the human race, religion being the sole influence competent to civilize, Providence disposed men to live under divine governments; hence everywhere reigned sacred laws, that is to say secret from the common people,—"leggi sagre, ch' è tanto dire quanto arcane e segrete al volgo dê popoli." These laws they preserved in a dumb language, by means of solemn ceremonies which remained in their legitimate acts,—atti legitimi; and which were then as necessary to the communication

[1] Scienza Nuova, Works, vol. v. p. 515.

of ideas and the wants of man as now words and gestures are. Then succeeded the human governments of civil aristocratic states; and naturally these persevered in celebrating religious customs, and with the secret religion they maintained secret laws. This secrecy is the very soul of aristocratic republics. With such regard for religion they observed the laws severely, and this rigour of civil equity is the principal safeguard of aristocracy. Next appeared the popular republics, with languages and letters, and whose nature is open, generous, and magnanimous, as that of the multitude which reigns in them, and where natural equity alone is known. Hence the laws were reduced to writing, as Pomponius narrates that the Roman plebeians would no longer endure the *jus latens.* This state of things was finally succeeded by the monarchial states, in which kings were willing to administer the laws according to natural equity.[1]

There are three species of judgments. The first were divine: in which state of things, there being no civil governments or laws, the fathers of families complained to the Gods of the injuries which had been done them. This was termed *implorare Deorum fidem.* They invoked the Gods in witness of their rights—*deos obtestari.* Such accusations and defences were the first orations; and hence the Latins used the term *oratio* accordingly. As we see in Plautus and in Terence, and in the Law of the XII Tables, where it is said, *furto orare*, and *pacto orare:* in the first phrase for *agere*, in the second for *excissere.* Orators, *oratores*, were those who pleaded before the judges, and were so termed because they originally addressed their prayers to the Gods. So the results of duels were regarded by barbarous nations in the light of the judgments of God.[2]

In the judgments of the second species there was observed a scrupulous fidelity to the letter of the law. This was natural in the transition, and hence arose the phrase *religio verborum;* for divine things are universally clothed in consecrated forms, in which it is not permitted

[1] Scienza Nuova, Works, vol. v. p. 518. [2] Ibid. p. 521.

to alter a letter. Hence this natural law of the heroic nations was naturally observed in the ancient Roman jurisprudence, and the word—*fari*—of the Prætor was a judgment never to be altered.[1] Numerous historical examples are adduced by Vico of the results of this technical phase of law through which nations naturally pass. Thus the Duumvirs felt themselves compelled to inflict a shameful and cruel punishment upon the great Horatius, although he had been proclaimed innocent; whilst the people to whom he had appealed pardoned him, as Livy says, *magis admiratione virtutis, quam jure causæ*. This species of judgments was very necessary in the times when law lay in violence. Thus Providence, wishing to spare men disputes and continuous troubles, decided that they should regard as the just and the lawful whatever should be presented to them as such by means of the solemn formulas. Finally, the result of a number of historical examples and comparisons is given by Vico thus:—"In barbarous times strict law is observed in words, which is properly *fas gentium;* in civilized times equitable law is decided from the equal utility of causes; which is properly the *fas naturæ*, the immutable law of humanity endowed with reason, the true and proper nature of man—"e che cosi a' tempi barbari è naturale la ragion stretta osservata nelle parole, ch è propiamente il fas gentium; com' a' tempi umani lo è la ragione benigna estimata da essa uguale utilità delle cause, che propiamente fas naturæ dee dirsi, diritto immutabile dell' umanità ragionevole, ch' é la vera è propia natura dell' uomo."[2]

In the third species of judgments the truth of facts is the principal element; next to which the dictates of conscience aid merciful laws in all that is necessary to the equitable utility of causes; they are protected by natural reverence, which is the offspring of intelligence, and they are guaranteed by good faith, which is the daughter of civilization: they are suitable to the publicity of popular republics, and the generosity of monarchies.

[1] Scienza Nuova, Works, vol. v. p. 525. [2] Ibid. lib. iv. p. 529.

All this antecedent series of events occurs during three epochs; of which the first is that of the religious times, and under divine governments; the second is the epoch of the quarrelsome—puntigliosi—of which Achilles was the type, and such as the duellists were on the return of barbarism; the third is the epoch of civilization, or of the natural law of nations, which Ulpian defined by adding the term *civilized*—jus naturale gentium humanarum. Hence the Latin writers termed the duty of subjects to the state *officium civile*, and called by the term *incivile* every error committed in the interpretation of the laws, or contrary to natural equity. In the last epoch of Roman jurisprudence, commencing with the period of popular liberty, the Prætors began to accommodate the laws to the changing nature of the Roman government, and to soften the rigour of the XII. Tables. Later the emperors divested natural equity of the mysterious veil in which the Prætors had enveloped it, and presented it openly, as became a civilized nation.

The corollary to the Fourth Book is expressed in Vico's very peculiar style. The ancient Roman Law was a serious poem, and the ancient Jurisprudence was a severe poesy, in which are found the first efforts of legal metaphysics; as with the Greeks Philosophy sprang from their laws:—"Il Diritto Romano fu un serioso Poema; e l' antica Giurisprudenza fu una severa Poesia; dentro la quale si truovano i primi dirozzamenti della Legal Metafisica; e come a' Greci dalle Legi usci la Filosofia.[1]

The ancient Roman jurisprudence presents a number of results, for which no causes are to be found beyond those already laid down, and above all this principle that men led by nature to the search after truth, when they cannot attain it, content themselves with what is certain. The mancipations commenced with the real hand, that is to say with real force; for force is an abstract, but the hand represents it. And the hand with all nations signifies power; whence came the terms *chirothesis* and *chirotone* amongst the Greeks; the former was

[1] Scienza Nuova, lib. iv. Corollario, Works, vol. v. p. 568.

the imposition of hands upon the heads of those whom they elected to power; the latter was the election by show of hands :—"solemnities proper to the periods without speech,—solemnita propie de' tempi mutoli." Such mancipation was occupation, the first great natural origin of all dominion,—"primo gran fonte naturale di tutti i domini." This the Romans practised in their wars, whence their slaves were termed *mancipia;* and property taken in war was termed *res mancipi* in relation to the Romans, and *res nec mancipi* in relation to the conquered people. Mancipation was followed by a true usucaption, that is to say, an acquisition of dominion ; for such is the signification of the term *usucapio* derived from *usus* in its true sense, signifying *possessio*, and *capio*. And the term *possessio* is without doubt derived from *porro sessio.*[1]

When the barbarism of the early ages began to be assuaged, and when judicial laws began to prohibit private violence, all the individual forces united in the public force were termed civil authority. The first nations, naturally poetical, then imitated the real forces which they had previously employed in order to protect their rights. By means, then, of a figurative mancipation and the legitimate acts which were the solemn ceremonies of nations whilst still without language, they provided for all their civil requirements. Later, when language became articulate, men wished to assure one another of their mutual intentions, and they required that their contracts should be clothed in solemn formulas; whence arose the certain and precise stipulations of the Roman Law.

But when the civilized periods arrived of the popular republics, intelligence began to illuminate the great assemblies; then the abstract reason of intelligence was comprised in the term *intellectus juris.* This intelligence is the will which the legislator has expressed in his law. This will is termed *jus;* and it is the will of the citizens united in one idea of a common welfare guided by reason. This too was in its nature spiritual; for all rights not

[1] Scienza Nuova, lib. iv. Coroll. Works, vol. v. p. 570.

exercised on material objects, and which are termed *nuda jura* were said *in intellectu juris consistere.* These rights being modes of a spiritual substance are indivisible, and consequently eternal, because corruption ensues only by division of parts. The interpreters of the Roman law have placed all their reputation for Legal Metaphysics upon the consideration of the indivisibility of rights in the famous question *de dividuis et individuis:* but they have not considered the no less important question, the everlasting nature of rights. Yet this might have aided them in considering two established rules of law: —the first *cessante fine legis, cessat lex,*—(although this maxim should rather run thus, *cessante ratione,* for the end of law is utility, but the reason for the law is a conformity of the law to a fact invested with certain circumstances):—the second, *tempus non est modus constituendi vel dissolvendi juris,* because time cannot commence nor end what is eternal. In the case of usucaption or prescription, for example, time does not produce or destroy the right, but the proof is that the possessor desired to deprive himself of it; and when we say that the usufruct has ceased, we are not understood to say that the right has been used, but only that the right of property has returned from the servitude to its original liberty. There are two important conclusions that may be drawn from all this: the first, that rights being eternal in idea, and man being subject to time, the first can have been communicated only by God; the second, that all the communicable, varied, and diversified rights which have been, are, or will be in the world, are various divine modifications of the power of the first man, prince of the human race, and of the dominion which he possessed over the earth;—che tutti gl' innumerabili varj diversi diritti che sono stati, sono e saranno nel mondo, sono varie modificazioni diverse della potestà' del primo uomo, che fu il principe del gener umano e del dominio ch' egli ebbe sopra tutta la terra.[1]

Finally, man being properly composed of mind, body,

[1] Scienza Nuova, lib. iv. Corzo di Nazioni, Works, vol. v. p. 576.

and the faculty of speech, and speech being placed intermediate between the mind and body, certainty on the subject of THE JUST commenced in the epoch without language by means of the body; when articulate words were first framed, the idea of the Just rested in certain formulas of words; finally when an human reason has been entirely developed, it has rested in the truth of ideas concerning the Just determined by reason according to the ultimate circumstances of facts. This is an informal formula of every particular form, which Varro named *formula naturæ*.[1]

The fifth book is occupied with the theory of the revolutions of nations in a fixed and certain orbit. It is full of historical illustrations and parallels; and attempts to give an ideal history of the eternal laws which govern all nations in their origin, progress, decline, and fall.[2] The work concludes with reflections upon an eternal and rational commonwealth, the best possible of its kind, and ordained by Divine Providence. Plato, says Vico, imagined a fourth species of Republic, in which the honourable and good were masters; which would be the true natural aristocracy. Such a republic as Plato imagined, Providence has designed from the first origin of nations, in ordaining that the men of gigantic stature dispersed and wandering on the mountains like ferocious beasts, should, struck with terror at the first thunder after the unusual deluge, have fled into the grottoes of the mountains, convinced by it of the existence of a superior power. Hence arose the governments which may be termed monastic, ruled by solitary sovereigns, submitted to the authority of a being supremely good and great, whose voice they heard in the thunder;—in which superstition there was yet a ray of truth, that God governed men. To this succeeded marriage. And Providence thus at first established economic states in monarchical forms, under the government of fathers, princes of their own families, distinguished by their sex, age,

[1] Scienza Nuova, lib. iv. Corzo di Nazioni, Works, vol. v. p. 579.
[2] Ibid. lib. iv. p. 608.

and virtues, and who, in the state of nature or of families, composed the first natural orders. Pious, chaste, and brave, fixed in their dwellings, in order to protect themselves and their families, they slew the beasts of prey, and conquered the stubborn earth by cultivation. Apart from them wandered yet men without respect for God, recognising no law or property, practising incest and rapine,—feeble, isolated wanderers. These sought a refuge in the asylums of the Fathers, and as clients augmented the patriarchal kingdoms. Thus were unfolded governments based upon orders of men naturally superior by means of heroic virtues,—as in piety, for they adored the Divinity, although they multiplied and divided it into gods;—as in prudence, for they consulted the gods by means of auspices;—as in temperance, since under the auspices of the gods they made one woman the companion of their lives;—as in fortitude, for they slew the beasts of prey and cultivated the land;—and in magnanimity, for they assisted the weak, and aided those in danger. These were the states of whose sovereigns Hercules is the type. Pious, wise, and brave, they conquered the proud and protected the humble, and such is the most excellent form of civil government—"che furono per natura le repubbliche Erculee; nelle quali pii, sapienti, casti forti, e magnanimi debellassero superbi e difendessero deboli; ch' è la forma eccelente de' civili governi."[1]

But finally, the Fathers, aggrandized by the labours of their clients, ill-treated them. Hence the clients revolted. But because human society could not exist without order, Providence persuaded the Fathers to unite with their attendants in a league to resist the rebels, and in order to pacify them granted the first agrarian law by which the Fathers permitted to them the bonitarian (usufructuary) property in the lands, retaining the sovereign property; "con la prima legge Agraria, che fu' nel mondo, permisero loro il dominio Bonitario de' campi, ritenendosi essi il dominio ottimo, o sia sovrano famigliare."[2] Hence arose the first cities under the reigning

[1] Scienza Nuova, lib. v., Works, vol. v. p. 613. [2] Ibid.

orders of the nobles. In conformity with the natural order, by species, sex, age, and virtue, Providence caused the civil order to arise in cities. The first of these orders, and which most nearly resembled that of nature, had, for its principle, the nobility of birth,—that is to say, in order to be admitted to it, and to rule over the plebeians who had not contracted marriages, it was necessary to have been born of parents who were united under the divine auspices. When the divine governments were ended, under which families had been governed by means of the divine auspices, the heroic governments succeeded, the principal stay of which consisted in the religious ceremonies kept secret by the heroic orders; and by means of the religious ceremonies all civil rights rested with the heroic orders alone. But because in such a nobility it depended upon fortune who should be the nobles, from this noble order arose as governors those fathers of families who were the most worthy. Amongst these last the strongest and bravest naturally took the lead in order to resist the aggressions of the clients. But this was in vain. The plebeians finally understood that they were of the same human nature with the nobles, and desired to enter into the civil orders of the state. Then, in designing that the people should be finally sovereign, Providence permitted the plebeians to contend a long time with the nobility in piety and religion in the heroic contests during which the nobility communicated to the plebeians the auspices, for the purpose of communicating to them all public and private civil rights, which they considered dependent on the auspices. By means of religion the Roman people arrived to the sovereignty of the state; in which, as they excelled all other nations, so they were the lords of the world. The civil orders thus mingling with the natural orders, the popular republics arose. But not wishing to deliver human things to the conduct of chance, Providence made the census the roll of honours, so that the industrious, not the idle, the thrifty, not the prodigal, the prudent, not the spendthrift, or at least those endowed with some virtue rather

than the poor whose vices were evident, should be considered the best suited for government. From such republics, in which the entire people strove in common to obtain justice, commanding laws which were of universal goodness,—such as Aristotle defined will without passion, or the will of heroes that commanded the passions,—from such republics formed to produce heroes, and hence interested in the truth, arose Philosophy. For as the actions of nations would no longer be performed through the mere sense of religion, Providence caused Philosophy to explain virtue to the end that if men did not possess the virtues themselves, they might at least blush for vices. Thus, also, arose eloquence, which in the popular republics commanded good laws, and made passionate appeals for justice,—which excited amongst the people the idea of virtue, and dictated good laws to them. But the popular states fell into corruption; consequently Philosophy fell also into scepticism, and denied and calumniated virtue; whilst false eloquence supported indifferently the opposite sides. Thus in Rome the tribunes of the people misusing eloquence, and the citizens employing their wealth not for the public order but their own aggrandizement, excited civil wars, brought affairs to total disorder, and from liberty produced perfect tyranny. For which great evils Providence employed one of its strongest remedies. Sometimes a man arose, like Augustus, who established himself as a monarch, placing his own will in place of the law which the popular liberty had rendered vain,—aided by force of arms, and satisfying the people on the subject of their religion and their natural liberty, without which satisfaction and content of the people monarchies would be neither strong nor lasting. But if Providence does not find a remedy within, it seeks it without. And when a people so corrupted have become naturally the slaves of their unbridled passions, luxury, avarice, envy, and pride; and when by their dissolute lives they are versed in all the vices proper to the vilest slaves, having become liars, calumniators, cheats, and

thieves; they then become slaves by the natural law of nations, and are subjected to the superior nations, which reduce the debased people to the state of a province. From these things shine forth two great and luminous principles of natural law, of which one is, that he who cannot govern himself must allow himself to be governed by another; the other is, that the world will always be governed by those who are superior in nature:—"Dipoi se la Provvedenza non truova sì fatto rimedio dentro, il va a cercar fuori; e poichè tali popoli di tanto corrotti erano già innanzi divenuti schiavi per natura delle sfrenate lor passioni, del lusso, della dilicatezza, dell' avarizia, dell' invidia, della superbia e del fasto; e per li piaceri della dissoluta lor vita, si rovesciano in tutti i vizj propj di vilissimi schiavi, come d' esser bugiardi, furbi, calumniatori, ladri, codardi, e finti; divengano schiavi per diritto natural delle genti, ch' esce da tal natura di nazioni, e vadano ad esser soggette a nazioni migliori, che l' abbiano conquistate con l' armi; e da queste si conservino ridutte in provincie; nello che pure rifulgon due grandi lumi d' ordine naturale; de' quali uno è, che chi non può governarsi da sè, si lasci governare da altri, che' l possa; l' altro è, che governino il mondo sempre quelli che sono per natura migliori."[1]

But if the people languish in the extremity of civil destruction, so that the nation cannot become monarchical, nor the superior nations come to conquer and preserve, then Providence employs an extreme remedy. For, because such a people, like beasts, had been accustomed to think of nothing but the particular individual gain of each;—had gone to the extremes of luxury and pride;—and had buried themselves in a solitude of mind and sentiment, so that no two could unite, each man following his own caprice,—they then proceed in obstinate factions, and desperate civil wars, to make wastes of cities, and waste the haunts of men, in such guise that after many ages of barbarism they destroy that evil subtlety of malicious minds, the result of the barbarism of

[1] Scienza Nuova, lib. v., Works, vol. v. p. 617.

reflection, not the barbarism of the senses. Nations subjected to this last remedy which Providence adopts, fall into abasement and stupidity, no longer appreciate the refinements and pleasures of life, but are contented with necessaries. From their diminished numbers and the abundance of necessaries, they become tolerant of one another; and in returning to primeval simplicity, they become religious, truthful: Piety, Faith, and Truth return,—the natural foundations of Justice, the graces and beauties of the eternal order of God.[1]

Vico then concludes that there is a great community of nations founded and governed by God. Wise legislators, the Lycurgi, the Solons, the Decemvirs, are exalted to heaven with praises for having by their salutary laws founded the three most illustrious cities in the world, Sparta, Athens, and Rome, which lasted but a short time in comparison with the universe of nations, ordered with such order, and founded with such laws, that from very corruption States take the form by which alone they can be preserved. This, then, is the design of a sovereign wisdom. Divinity ordains the plan. Men themselves have made this world of nations. But they have made it under the will of an infinite Spirit, often different, sometimes opposed, and always superior in its conceptions to the particular and narrow views of man,—which narrow views yet serve an end more grand, the preservation of the human race upon the earth. From lust arises marriage,—then families; the Fathers wished to exercise the paternal power immediately over their clients, hence arose cities: the reigning orders of the nobility desired to abuse their seignorial power over the plebeians, and they came under the dominion of the laws, which made popular liberty: free nations desired to escape from the chain of the laws, and they came under the sway of monarchs: monarchs, to secure themselves, plunged their subjects into all vices, and thus disposed them to support the slavery of the stronger nations: nations wished to disperse themselves, and they preserved their remains in

[1] Scienza Nuova, lib. v., Works, vol. v. p. 618.

the deserts,—whence, as a phœnix, to arise again. All this has been done by Mind, for men have done these things with understanding; not by Fate, for they have done so by choice; not by Chance, for the return of the same causes has always produced the same effects. Hence Epicurus, and his followers Hobbes and Machiavelli, have been wrong in attributing to Chance the direction of the world; Zeno and Spinosa in attributing it to Fate. Plato, the prince of political philosophers, has said with more wisdom, that human affairs were regulated by Providence. And the Roman jurisconsults have established Providence as the first principle of the natural law of nations. Vico, in the foregoing work, has attempted to demonstrate that Providence gave to the first governments of the world religion, upon which alone rested the state of families; then that religion was the principal firm support of the civil heroic or aristocratic governments; then that it served as the means by which the people arrived at popular governments; finally, that in monarchical governments religion became the shield of princes; hence that when nations lost religion there remained to them, in order to live in society, neither shield for defence, nor means for counsel, nor support, nor form. The Scienza Nuova concludes with the reflection that the science which it teaches is indissolubly connected with the study of piety, and that without being pious we cannot be wise:[1]—"In somma da tutto ciò che si è in quest' opera ragionato, è da finalmente conchiudersi che questa Scienza parta indivisibilmente seco lo studio della pieta, e che, se non siesi pio, non si può daddovero esser saggio."[2]

[1] Scienza Nuova, finis.

[2] It is difficult for a writer to avoid colouring his pages with the peculiar tints seen from the point of view upon which he has been placed by nature and fortune. I have translated the above passages from Vico, whilst staying in one of the summer retreats of Ireland. It is a very obscure corner of the world. The moor slopes down to the river; the long pool is swollen by a rising flood; and the salmon leaps at the point of the rock; the Atlantic rolls beyond the mountains which enclose the view, and which rise until they are lost in the September mists, tinged with the purple rays of the declining sun. In the distance the river foams over the rocky fall, or murmurs in the stream, or is still in the spreading pool. The scene is fair; the rain is over;

2. Beccaria, 1735–1793.

Works:—Dei Delitti e delle Pene, 1784, translated into English, Dublin, Exshaw, 1767; On the Disarrangement of the Currency of Milan, and the Means of remedying it, 1762; Discourse on Commerce and Public Government, translated into French by Comparet, Lausanne and Paris, 1769; Elementi di Economia Publica, published in Custodi's Collection of Italian Economists, 1804; Milan, 1821.

From the time that the Italian Republics had lost their liberty and political independence the wealth of Italy declined, until the sciences of Public Economy and Legislation began to heal the wounds caused by tyranny. The glory of Mediæval Italy vanished in 1530, when Charles V. had destroyed the Tuscan Republics, and placed them under the iron yoke of Naples and Milan. For more than two centuries, from 1530 to 1750, disorder reigned over all Italy, except in Genoa and Venice, which with their liberty still preserved their prosperity. Political science united with liberty has produced the triumphs presented by England and the United States. Where liberty does not exist, science still in some measure supplies its efficacy. Political science, in its ultimate analysis, is only a portion of liberty; for the principles which guide a nation to wealth and to liberty are the same. The theory of public credit and of taxation is only a bridle imposed on the arbitrary and absolute authority of the sovereign. Every theory of the employ-

the flood swells; the wind rises. But the huts, round which some few ragged creatures creep, remind the spectator that he is in Ireland. The natural industry of man is here cowed by hopeless poverty. In this most western portion of Europe the Keltic race have abided, since ages before the Christian era they were forced hither by the successive waves of emigration from Irania. The peasantry whom I meet in my daily walks are the same in thought and language as their forefathers for centuries. In vain for them have the miracles of science been wrought; for them the current of civilization has flowed in vain. Two thousand years ago the Irish-speaking race was taller, stronger, and better housed and clad and fed, than now, with a higher position in the world, both relatively and absolutely. The English law does not animate this sluggish mass of life. It does not live in the common consciousness of the people. The people believe their government to be their greatest enemy. The terrible agrarian murders show that no sympathy exists between landlords and tenants. Rack-rent, famine, eviction, assassination, are the words used to describe the normal conditions which belong to the tenure of land in Ireland. Here is a field for the Jurist, the Publicist, and the Law Reformer!

ment, the accumulation, and the distribution of capital is founded on the inviolable right of property. The liberty of exercising every profession, the abolition of customs duties between portions of the same country, is only the concession of a portion of individual liberty. By these reforms of abuses the Citizen is but more free in his actions. But science is still an imperfect substitute for freedom; and is always liable to be crushed by the hand that employed it. Louis XIV., after having reanimated the industry and the commerce of his empire, in lending capital to artisans, and inviting foreign mechanics to France, a few years afterwards abandons the great enterprise he had commenced, revokes the edict of Nantes, and drives from his dominions half a million of his most industrious subjects. Hence the legal and political sciences are more necessary, as regards the administration of the State, to absolute than to free governments. In the latter, education, the liberty of the press, popular assemblies, public debates, form financiers and statesmen. The stability of laws, the inviolability of person and property, honours and offices conferred by public opinion and not by caprice or intrigue,—all encourage industry. In absolute monarchies all remains plunged in profound lethargy; an impenetrable secret covers the actions of the government. There is no school for publicists, and no experience can be acquired. Administration is a mysterious monopoly for some employés. Books, then, alone, though imperfectly, can supply the want of experience, correct the errors of administration, and indicate the necessary reforms. Political science has been very differently treated in England and Italy. In England for a long time it has been considered as an isolated science—the science of the wealth of nations, and this has been the main object of the research of economists. In Italy it has been regarded as a complex science—the science of administration; and the Italian publicists have treated it in all its relations with morals and public happiness. The works of political economists are in England the natural productions of the soil. In the midst of the

living example of commerce with all the nations of the world, in the midst of the debates of Parliament on public affairs, in the midst of so many journals and free discussions, the science ought not only to flourish, but to arrive at more perfection than anywhere else. A free government is the perpetual school of the statesman. All the other sciences in England have made great progress. But Adam Smith in political economy is at a higher degree of eminence than Locke in metaphysics, or Newton in astronomy. In Italy, on the other hand, books on political science have been like tropical fruits struggling with an ungenial atmosphere. Arbitrary power might occasionally grant tolerance, but never liberty. English writers on politics, with the exception of Adam Smith, who frequently alludes to France, and David Hume, whose learning is diffused over the entire world, have rarely carried their reflections beyond the limits of their own island. Through the egotism of a free man, who concentrates all his thoughts on his country, an English economist rarely cites foreign authors. Justly proud of their liberty, satisfied with the prosperity of their country, they have believed it useless to take counsel from writers born under despotism. On the contrary, the Italian writers, without liberty, and consequently without a just motive for national pride, regard with envy the rich and powerful nations of the North. Hence they cite and extol foreign writers,—sometimes too much. Political economists, too, from the same reasons, have been of less importance in England than in Italy. There is in England no great reform which can be attributed to the individual exertion of any writer; even Free Trade cannot be said to be a homage to the author of the "Wealth of Nations." Political economists had been convinced of the necessity of Free Trade in corn for eighty years before Free Trade was carried by Sir Robert Peel in 1846. It must ever be of advantage to destroy prejudice, to enlighten the public mind, to excite thought,—still it must be admitted that the economists of Italy have served their country yet more than

the economists of England. Most of the reforms accomplished in the different provinces of Italy during the last century have immediately followed the publication of the great works which indicated them. In Austrian Lombardy Beccaria contributed to the reform in the currency, the abolition of torture, and the reform of the laws of criminal procedure. Through his advice the government established a chair of political economy. In Tuscany the Grand Duke Leopold published the criminal code worthy of the imagination of Beccaria and the heart of Titus. Capital punishment, torture, and the confiscation of property were abolished by an essay of Beccaria.

Cesar Bonesano, Marquis Beccaria, was born at Milan in 1735. From his youth he applied himself to the study of political science. Gifted with a memory as profound as that of Rousseau, he avoided paradoxes, and sought practical truths. Since Vico the Italians have shown no originality in mental philosophy. Beccaria and his contemporary Filangieri busied themselves with the questions of the day in the reformation of social evils. Beccaria went in search of the vices of society; not like the philosopher of Geneva, in order to excite despair for the prospects of humanity, but in order to ameliorate the condition of man, by pointing out a remedy for the evils which afflict him. His first productions were some observations that he published at the age of twenty-seven, in the year 1762, upon the derangement of the currency in Milan. Two years afterwards he published his great work "On Crimes and Punishments." This book has been translated into twenty-two languages. Immediately on its publication it attained a great celebrity. In consequence of it, Leopold II. of Tuscany abolished capital punishment throughout his dominions. The Empress Catherine invited the author to establish himself at St. Petersburgh; but the government detained him in his own country, by creating expressly for the young philosopher, in the University of Pavia, a chair of Political Economy.

It was in 1768 that Count Firmiliani, the Austrian

Governor of Lombardy, a distinguished protector of the sciences, created for Beccaria a chair of Political Economy,—the second in Italy. The first had been established by Bartholomeo Intieri for Antonio Genovesi in 1755. Sweden was the first State to follow this useful example: a similar chair was established at Stockholm in 1758. Finally, Germany, Russia, and France had their chairs of commerce. England was the last to follow the example given by Italy. It was not until 1825, that Mr. Drummond, at his own expense, instituted a chair of political economy at Oxford. This science, however, had always been taught in Scotland by the Professors of Philosophy. Whilst Adam Smith was Professor of Moral Philosophy in the University of Glasgow, he commenced, from the year 1754, to publish the theories which, later, he developed in his great work printed in 1775. In Edinburgh, Dugald Stuart associated Public Economy to the Moral Philosophy of which he was there Professor. Nevertheless, the honour of having first placed Political Economy in the same rank with the other sciences in the Universities belongs to Italy alone. It is to the circumstance of his Professorship that we owe Beccaria's principal economical works. He was united with Ferri, Filangieri, and many of the French Economists. According to Say, he was one of the first to analyse the functions of capital, and to remark the advantages of the division of labour, although he was far from perceiving all the consequences of it. Like most of the economists of his age, not having for basis of theory the solid support of a doctrine already formed, Beccaria mingled many grave errors with many sound principles. Thus, in the Treatise on "Crimes and Punishments," he sometimes fell into the errors of the Communistic School.

I now proceed to give an analysis of the Treatise on "Crimes and Punishments."

Beccaria defined laws as the conditions under which men, naturally independent, united themselves in society. Weary of living in a continual state of war, and of en-

joying a liberty which became of little value from the uncertainty of its duration, they sacrificed one part of it to enjoy the rest in peace and security.[1] In this he appears to allude to the doctrine of an original compact, afterwards detailed by Rousseau. But Savigny has shown, that the growth of law in a community is natural, like the development of language. Every punishment which does not arise from absolute necessity, says Montesquieu, is tyrannical. The right of the State to punish crimes is grounded upon the necessity of defending the public liberty from the usurpation of individuals.[2]

If every individual be bound to society, society is equally bound to him by a contract which, from its nature, equally binds both parties. This obligation, which descends from the throne to the cottage, and equally binds the highest and the lowest of mankind, signifies nothing more than that it is the interest of all that consensions which are useful to the greatest number should be punctually observed. The violation of this compact by any individual is an introduction to anarchy.[3]

Crimes will be less frequent in proportion as the code of laws is more universally read and understood; for there is no doubt but that the eloquence of the passions is greatly assisted by the ignorance and uncertainty of punishments. Hence it follows that, without written laws, no society will ever acquire a fixed form of government, in which the power is vested in the whole, and not in any part of the society; and in which the laws are not to be altered but by the will of the whole, nor corrupted by the force of private interest. Laws cannot resist the inevitable force of time, if there be not a lasting monument of the social compact. Hence the art of Printing makes the public, and not a few individuals, the guardians and defenders of the laws. The art of diffusing literature has gradually dissipated the gloomy spirit of cabal and intrigue. To this art it is owing that the atrocious crimes of our ancestors, who were alternately slaves and tyrants, are become less frequent. Those acquainted

[1] Chap. i. [2] Chap. ii. [3] Chap. iii.

with the history of the two or three last centuries may contemplate the effects of what was so improperly called ancient simplicity and good faith,—the avarice and ambition of a few staining with human blood the thrones and palaces of kings,—secret treasons and public massacres,—every noble a tyrant over the people. They may speak of the corruption and degeneracy of the present age; but happily there are now no such horrid examples of cruelty and oppression.[1]

It is not only the common interest of mankind that crimes should not be committed, but that crimes of every kind should be less frequent in proportion to the evil they produce to society. Therefore the means made use of by the legislature to prevent crimes should be more powerful in proportion as crimes are destructive of the public safety and happiness, and as the inducements to commit them are stronger.

A scale of crimes may therefore be formed, of which the highest degree should consist of those which immediately tend to the dissolution of society ; and the lowest, of those which inflict the smallest possible injustice on a private member of the society.[2] Crimes are to be estimated by the injury done to society. This is one of the palpable truths evident to the meanest capacity ; yet, by a combination of circumstances, it is known only to a few thinking men in every nation and in every age. The highest crimes are those of treason—*læsæ majestatis.* Next succeed those destructive of the security of individuals. The opinion that every member of society has a right to do any thing that is not contrary to the laws, without fearing any other inconveniences than those which are the natural consequences of the action itself, is a political dogma which should be defended by the laws, inculcated by the magistrates, and believed by the people ; a sacred dogma, without which there can be no lawful society. By this principle our minds become free, active, and vigorous. By this alone we are inspired with that virtue which knows no fear, so different from

[1] Chap. v. [2] Chap. vi.

that pliant prudence, worthy of those only who can bear a precarious existence. Attempts, therefore, against the life and liberty of a citizen are crimes of the highest nature.[1]

Beccaria next considers the question of duelling. The more intimate connections of men, and the progress of their knowledge, give rise to an infinite number of necessities, and mutual acts of friendship between the members of society. These necessities were not foreseen by the laws, and could not be satisfied by the actual power of each individual. Thus began the despotism of opinion, as being the only means of obtaining those benefits which the law could not procure, and of removing those evils against which the laws were no security. Opinion, that tormentor of the wise and ignorant, has exalted the appearance of virtue above virtue itself.[2] From the necessity of the esteem of others have arisen single combats, and they have been established by the anarchy of the laws. In vain have the laws endeavoured to abolish this custom by punishing the offenders with death. A man of honour, deprived of the esteem of others, foresees that he must be reduced either to a solitary existence, insupportable to a social creature, or become the object of perpetual insult; considerations sufficient to overcome the fear of death.[3] It is plain that the best method to prevent duelling, in addition to the severity of punishment to be attached to such an offence against the public peace, is to provide by the laws efficient redress for those wrongs which the duellist endeavours to avenge by the murder of his adversary. Thus may disappear this memorial of that ancient and savage mode of legal procedure—the trials by battle in the Middle Ages.

The intent of punishment is not to torment a sensible being, nor to undo a crime already committed; it is to prevent the individual from doing further injury to society, and to prevent others from committing the like offence.[4]

[1] Chap. viii. [2] Chap. ix. [3] Chap. ix. [4] Chap. xii.

The more immediately after the commission of a crime a punishment is inflicted, the more just and useful it will be. It will be the more just, because it spares the criminal the cruel and superfluous torment of uncertainty, which increases in proportion to the strength of his imagination, and the sense of his weakness; and because the privation of liberty being a punishment, ought to be inflicted before condemnation but for as short a time as possible. And an immediate punishment is more useful; because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of crime and punishment; so that they may be considered, one as the cause, and the other as the unavoidable and necessary effect.[1]

Crimes are more effectually prevented by the certainty than the severity of punishment. Hence in a magistrate the necessity of vigilance, and in a judge of implacability, which, that it may become a useful virtue, should be joined to a mild administration of the law. The certainty of a small punishment will make a stronger impression than the fear of one more severe, if attended with the hopes of escaping; for it is the nature of mankind to be terrified at the approach of the smallest inevitable evil; whilst hope, the best gift of Heaven, has the power of dispelling the apprehension of a greater.[2]

The twenty-eighth chapter contains the celebrated argument on the punishment of death; the immediate effect of which was the abolition of capital punishment in Tuscany. Beccaria shows that the infliction of this punishment is not founded on any right; a question which it is not necessary here to discuss. It is therefore a war of the whole nation against a citizen, whose destruction they consider as necessary or useful to the general good. The death of a citizen cannot be necessary but in one case—when, though deprived of his liberty, he has such power and connections as may endanger the security of the nation; when his existence

[1] Chap. xix. [2] Chap. xxvii.

may produce a dangerous revolution in the established form of government. But even in this case it can only be necessary when a nation is on the verge of recovering or losing its liberty; or in times of absolute anarchy, when the disorders themselves hold the place of laws.

It is not the intenseness of the pain that has the greatest effect on the mind, but its continuance; for our sensibility is more easily and powerfully affected by weak but repeated impressions than by a violent but momentary impulse. A punishment to be just should have only that degree of severity which is sufficient to deter others. Now, there is no man who, upon the least reflection, would put in competition the fatal and perpetual loss of his liberty with the greatest advantages he could possibly obtain in consequence of a crime. Perpetual slavery, then, has in it all that is necessary to deter the most hardened and determined, as much as the punishment of death.

The punishment of death, says Beccaria, is pernicious to society from the example of barbarity it affords. The natural sentiments of every person concerning it are expressed in the contempt and indignation with which every one looks on the executioner, who is, nevertheless, the innocent executor of the public will; a good citizen, who, according to the law, contributes to the advantage of society; the instrument of the general security within, as good soldiers are without.

It is objected, that almost all nations, in all ages, have punished certain crimes with death. But Beccaria answers that the force of these examples vanishes when opposed to truth, against which prescription is urged in vain. The history of mankind is an immense sea of errors, in which a few obscure truths may here and there be found. Human sacrifices have also been common in almost all nations.[1]

It is well known what an effect the publication of Beccaria's Treatise had upon lessening the barbarity of punishment then prevalent in Europe; its immediate and

[1] Chap. xxvii.

acknowledged result was the total abolition of capital punishment in Tuscany by the Grand Duke Leopold. It is, however, plain that certain principles in human nature render capital punishment necessary, just, and expedient in certain stages of society. The origin of Punishment is Revenge. And the amount of punishment, and the desire to inflict it, vary in intensity according as the act done injures more or less a greater or smaller number of individuals. An injury caused by breach of contract affecting merely an individual is punished under all systems of law by awarding compensation to the injured party, and by making the wrong-doer pay the expenses of the legal machinery by which the amount of compensation to be awarded has been ascertained. But if the wrong-doer break into a house by night, or waylay and rob another, or kill another, the general indignation, composed of pity for the sufferer, and a sense of insecurity occasioned by the act, vents itself in different degrees of punishment culminating in Death —the extinction of the criminal. It is easy to understand why death was usually employed as the punishment for a vast number of crimes in more ancient and barbarous times. The advantages were unknown which modern society enjoys in the regulations of Police, in the security of travelling, in the protection of the Law, and the redress which it affords when injury has been done to person or property. It was a puzzle how to punish a heinous criminal except by removing him from the world. All difficulties were thus removed. If he were merely subjected to momentarily-severe suffering, he was turned loose, still further exasperated against society; if he were imprisoned, escape by stratagem, a release through the caprice of the governing body, or by the forcible rescue of friends, was apprehended. Death cut the knot of all these difficulties; justice and the popular sentiment were satisfied; and when the death of the criminal was surrounded by all the circumstances of horror with which the King of Terrors could be invested, the fear inspired by the punishment deterred

future offenders. The question of the expediency of abolishing capital punishment is difficult. The legal object of punishment—considered apart from revenge, and the natural gratification which men have in seeing the wicked suffer—should be the prevention of crime. Crime is committed either under the influence of some furious evil impulse, when the criminal does not at all reflect upon the punishment awarded by the law; or, the criminal calculates upon the chances of detection and punishment, and deliberately violates the law. The former class of crimes can be diminished by no severity of punishment; they will gradually diminish in number with the progress of civilization, the improvement of morals, the spread of education, and the consequent increase of the power of self-control. The crimes committed by blind impulse of passion, or the deliberate malice which disregards consequences, are, however, those which are generally visited with capital punishment. Yet punishment cannot prevent them. If detection were certain, conviction certain, and punishment, however lenient, certain, few crimes would be committed. No man would ever commit one of the ordinary offences against person or property, if he were certain, and reflected that he would be compelled to make restitution to the party injured, and that he would also suffer in his person or property. It has always been urged, as an objection to capital punishment, that it tends to render conviction uncertain. In England, at the commencement of the present century, capital punishment was awarded for upwards of 160 offences, some of them being the most trivial thefts. When the law was in force that the larceny of goods to the value of £2 in a dwelling-house should be a capital offence, the jury, in order to save the wretch from death, invariably found that the property was only worth 39*s*., and thus, in numerous instances, the thief escaped without any punishment. When forgery was punished by death in England, the injured merchant was unwilling to come forward, and by his prosecution to consign to an early grave the man who, perhaps, yielding to extra-

vagance, had run into debt, and then, in a rash moment, committed the offence. The same result took place in other similar cases. The injured party was unwilling to prosecute; witnesses were disposed to withhold their testimony, or to weaken its effect by a little pious prevarication; the judge favoured a merciful inclination of the jury. But these facts only tell the legislator that capital punishment ought to be discontinued whenever the popular sense of justice is opposed to it. Again: it has been urged that capital punishment directly defeats the end of justice in this respect,—that it destroys a source of evidence which might be beneficially employed for the detection of criminals. By the death of a criminal all his recollections of the crimes of others perish; and impunity results to all who might have been detected by his testimony. The time during which a criminal process is going on is one of anxiety to the accomplices of the prisoner. They reflect upon the tamperings to which he may be subjected in prison; even in the short time between his condemnation and his death, and up to the last moment, the accomplices must labour under the dread of discovery. At his death they are at once relieved, and receive, as it were, a new license to proceed in the career of crime. The fidelity of the criminal is extolled amongst his former companions; and he is pointed out to the rising generation as an example to imitate. Such stubborn resolution is well known to exist to an extraordinary degree amongst the unfortunates condemned to death; and, up to the moment when the bolt is drawn that sends them to eternity, they protest their innocence, and refuse to betray their companions. But if imprisonment were the punishment for heinous offences instead of death, then in solitary and protracted gloom, a severer trial would await that heroism which now defies the brief period between condemnation and the grave. Again: there is a danger attending the employment of capital punishment, which has been urged to show that it should never be used amongst Christian and civilized societies. The mysterious ways

of Providence have often conducted an innocent man to condemnation; and death is irrevocable. The present misery of an innocent man condemned to death is about the greatest which can be imagined. And, though he may hope that at some distant time chance may bring the truth to light, and late justice be done to his memory, still he must feel that his blood will have been shed uselessly for mankind, and that his melancholy story will serve, wherever it may be told, only to excite alarm in the hearts of the good, and speculation amongst the wicked, as to the uncertainty of the dreadful punishment awarded by the law. Notwithstanding all the objections urged against the employment of capital punishment, it must be used by a government wherever it suits the temper and sentiment of the people. The order of things is as good as the character of the population permits it to be. And whilst death is regarded by the bulk of the population as the natural punishment for terrible crimes, the government would be unwise that should discontinue its use. Having thus briefly stated these views on Capital Punishment, I resume the analysis of Beccaria's Essay.

In the succeeding chapters Beccaria considers different species of crimes, and draws the conclusion that the punishment of a crime cannot be just—that is necessary,—if the laws themselves have not endeavoured to prevent that crime by the best means which time and circumstances would allow.[1]

It is better to prevent crimes than to punish them. This is the fundamental principle of good legislation, which is the art of conducting man to the maximum of happiness and the minimum of misery, if we may apply this mathematical expression to the good and evil of life. Would we prevent crimes? Let the laws be clear and simple; let the entire force of the nation be united in their defence; let them be intended rather to favour every individual than any particular classes of men; let the laws be feared, and the laws only. The fear of the

[1] Chap. xxiii.

laws is salutary, but the fear of man is a fruitful and fatal source of crimes. Men enslaved are more voluptuous, more debauched, and more cruel than those who are in a state of freedom.[1] Let liberty be attended with knowledge. As knowledge extends, the disadvantages which attend it diminish, and the advantages increase. A daring impostor, who is always a man of some genius, is adored by the ignorant populace, and despised by men of understanding. Knowledge facilitates the comparison of objects, by showing them in different points of view. When the clouds of ignorance are dispelled by the radiance of knowledge, authority trembles, but the force of the laws remains immovable. Finally, the most certain method of preventing crimes is to perfect the system of education.[2]

In conclusion, the severity of punishments ought to be in proportion to the state of the nation. Among a people hardly yet emerged from barbarity they should be most severe, as strong impressions are required; but in proportion as the minds of men become softened by their intercourse in society, the severity of punishments should be diminished, if it be intended that the necessary relation between the object and the sensation should be maintained.

The concluding theorem of Beccaria is, that to prevent punishment from being an act of violence, of one, or of many, against a private member of society, it should be public, immediate, and necessary; the least possible in the case given; proportional to the crime, and determined by the laws. Beccaria entertained the most enlightened views on the various topics which still continue to be agitated in politics. He was not an absolute Free-trader. He considered that absence of interference—*laissez faire*—was the test of all the systems which the most refined policy could desire in matters regarding the supply of provisions; but admitted that in certain cases there was room for some rules and restrictions. He was opposed to entails, primogeniture, and the system of mortmains.

[1] Chap. xli. [2] Chap. xlv.

The question of large or small farming—*la grande ou la petite culture*—was then much discussed. Beccaria considered that we should regard only the quantity of produce. He insisted on the advantages of the system of large farming, as that which leaves the greatest net produce, supports manufactures, pays taxes, and finally puts in motion every machine of a nation's economy. It may, then, be said, how can a system of large farming flourish without great properties bound for ever by entails? Beccaria's answer to this is wise and profound. He says that, when once Free Trade in the productions of the soil is established, the price of provisions is raised, and that then the system of large farming is introduced everywhere. Thus, lands too much divided, for example, by the succession of families, either will be given in mortgage to a single farmer, or will be sold to one who will reunite them in one farm. It is plain that if trade were perfectly free, if the transfer of land were disentangled from feudal difficulties and legal technicalities, the question would be decided easily; and the system of large or small farms would then be adopted in different countries according as it would be found most profitable.

Beccaria, in Paris, made the acquaintance of all the great men who lived in France at this epoch, and was the particular friend of Condorcet. He died in 1793, leaving a name worthy of being ranked with the most profound thinkers of Italy,—Machiavelli, Galileo, Vico. His death was a loss to the cause of Italian freedom. Where he served with such zeal a foreign government, with what affection would he not have served a national government; with what love would he not have supported liberty—the expansive force of nations? But Vico, Beccaria, and Filangieri all unavoidably display the tendencies of those who write under despotic governments. They recognise only philosophers and statesmen. They do not appeal to the popular will. It is only from the princes that they demand social reforms. Without liberty, the prosperity of a state may be temporarily forced by the energy of the sovereign: but it cannot be permanent.

3. Gætano Filangieri, 1752–1788.

La Scienza della Legislatione. 7 vols. Naples: 1780–85, 8vo. Translated into most European languages.

Beccaria was cotemporary in Italy with Filangieri. Both nobles and magistrates in their respective countries, cultivating the same philosophy, they seemed destined to prepare the minds of their countrymen for Legal Reform. Beccaria attacked principally the cruelty of the laws of punishment, Filangieri the absurdity of those of procedure. Beccaria was greater as a philosopher, Filangieri as a legislator. Each excited the admiration of foreign statesmen. Benjamin Franklin wrote to Filangieri that his immortal work was the object of the astonishment and instruction of the free citizens of North America. Voltaire wrote to Beccaria that he was the benefactor of all Europe. If the Treatise of Beccaria on Crimes and Punishments was translated into twenty-two different languages, and innumerable editions, the work of Filangieri may reckon, independently of the Italian editions, two in French, two in German, and one in Spanish. Beccaria was honoured with the commentaries of Voltaire and Condorcet; Filangieri, in our own time, with that of Benjamin Constant. Filangieri was born in Naples, on the 18th of August, 1752. He was the third son of Cæsar, Prince of Arionelli. His mother was Duchess of Fraquito. According to the usual lot of cadets belonging to ancient families, he was destined to the military profession. In 1768 he was made an ensign. However, his taste for the *belles-lettres* prevailed, and he quitted the service at the age of eighteen. A year after, he had already traced the plans of works upon Public and Private Education and the Morality of Princes. The Marquis de Tanucci had charged Pasquale Civillo with the preparation of a new Code drawn from the chaos of Neapolitan Jurisprudence. It appeared under the title of the *Code Carolino*. But it remained without authority in the midst of the prejudices opposed to it by

the Neapolitan Bar. Tanucci desired to ameliorate the administration of justice by a particular ordinance, which enjoined the judges to base their judgments upon the laws and not on the opinions of doctors and commentators. Legal science must have been at a low ebb in Naples when such a decree was necessary. The bar and the judges were indignant. There was a general clamour when a young advocate, in a little pamphlet, undertook the defence of the royal ordinance, and demonstrated the benefits of it. In the work he showed that arbitrariness in judgments is incompatible with civil liberty, and he developed an instinct full of sagacity for legislation and law. Tanucci took him into the service of the court. One of his uncles was now promoted to the Archbishopric of Naples in 1775, and Filangieri obtained a place on the road to the highest promotion. This gave him leisure from practice at the Bar, and he was enabled to devote himself to political literature. He worked steadily at his favourite subject. The two first volumes of the "Science of Legislation" were published in 1780, the two following in 1783, and the three last in 1785. Two years after Filangieri was appointed Minister of Finance. Indefatigable in his exertions, he exhausted his once robust health, and died in 1788, not having reached his thirty-sixth year. His great work was incomplete. Nevertheless it has been received with enthusiasm, and reckons twelve Italian editions, and many German, Spanish, French, and English translations.

The "Science of Legislation"[1] commences with a disquisition upon the object of Legislation as deduced from the origin of civil societies. One principle gave birth to civil society,—the desire for safety and tranquillity. The idea of a ferocious life previous to civil society, where, as some misanthropists have supposed, man wandered like the savage, is, perhaps, imaginary. It would betray an ignorance of human nature to believe that we were born for such a dreary and precarious existence, or

[1] The Science of Legislation. Translated by R. Clayton. London. Ostele: 1806.

that the state of natural society was a state of natural violence. "On the contrary," says Filangieri, "it is reasonable to conclude that society was coeval with man, and that the savage in his woods exhibits rather the picture of fallen, degenerate man in an unnatural state,—the ruined, degraded species, than his living image in the infancy of the world."

In primitive society, the only inequality that could not be extirpated was the inequality arising from force and strength; but in the progress of time, as the human passions discovered themselves, they necessarily produced numerous disorders. Then life and honour ceased to be other than precarious blessings, of which the possessor was likely to be deprived as often as a restless and malignant spirit was united to a gigantic and athletic frame. Suspicion and fear disturbed this primitive society, and there was but one remedy to correct the evil. A public force was required, a moral person was wanting to represent the public will, and to be the guardian of its power, and determined rules of government were wanting calculated to maintain the equilibrium between the wants of each citizen, and his means of gratifying them,—to the end that by the liberty of acquiring every requisite for personal preservation and personal tranquillity, each individual might be amply recompensed for the surrender of his original independence.

Filangieri then considers, in elegant language and with happy illustration, the subjects comprehended under the tranquillity and preservation which are the duties of government. The distribution of wealth is discussed somewhat imperfectly. "Exorbitant riches," says Filangieri, "and luxurious idleness are symptoms of national infelicity, and suppose the misery of the great bulk of the people. They are civil partialities prejudicial to the public interest, for a state can only be rich and happy in the single instance where every individual, by the moderate labour of a few hours, can easily supply his own wants and those of his family. Constant labour,

and a life supported with difficulty, can have no pretensions to the title of a happy life. It was the miserable doom of Sisyphus." We can here read the sentiments of a jurist who wrote under the glorious sun of Naples, where mere existence is enjoyment, and the *dolce far niente* is the summit of happiness for the indolent populations.

Legislation, like all other sciences, must have its rules. "That the will of the legislator is the only rule" has been the language of tyrants; and, amidst the revolutions which perpetually vary the situation of affairs, and the aspect of society, the error, that it is not possible for this science to have any certain and immutable principles, has been indiscreetly adopted. Government is a complicated machine; its wheels are not always the same, and the force which communicates to them their motion differs at different times. Yet this does not prove that the laws on which they act, and by which they are regulated, are not themselves determinate and fixed. Providence could never have intended that a science so peculiarly connected with social order, and where an error might be as destructive to whole nations as the wrath of offended Heaven, should be devoid of certain and inscrutable rules.

Nothing is more easy than to commit an error in legislation, though nothing is more difficult to rectify, and nothing so destructive to a country. The loss of a province, or an ill-conducted and injudicious war, is the scourge of a moment; but a political mistake, an error in legislation, involves the ruin of a nation, and prepares its misery for ages of futurity. Filangieri then proceeds to give some historical examples. Spain, under Charles V., was the most advanced nation in Europe. This nation, which first carried its trophies into a new hemisphere, was blest with the most advantageous position, and united the most fertile country in Europe with the richest in America. Spain might have been the happiest and richest nation upon earth; and had within herself the materials for a long and uninterrupted series of

prosperity. But all these advantages were lost. An instantaneous and insupportable increase of taxes followed the expulsion of the Moors. Her legislators, far from being citizens of the world, did not perceive that the prosperity of Spain was connected with the prosperity of other European nations; or that, without increasing the riches of her neighbours, and diffusing a part of her treasure through the rest of Europe, she could not preserve her own. The prohibitive laws of Spain have checked population, destroyed agriculture, and ruined the industry of the country, which has been literally metamorphosed into a dropsical body, unable to retain the liquids which it could not submit to drink with moderation.

So when the French Government exiled the industrious inhabitants who did not choose to renounce, at the pleasure of an arbitrary monarch, the undeniable right of the human mind—the right of religious liberty —the state was deprived of its manufactures, which the unfortunate refugees introduced into the governments that had the wisdom to receive them. Colbert, too, turned the whole of his attention to the internal manufactures of the kingdom; by his encouragement, the labours of the loom, and at the expense of the solid advantages of agriculture, gave France a transient and treacherous prosperity.[1]

In the fourth chapter Filangieri discusses the absolute goodness of laws. This absolute goodness consists in their agreement with the universal principles of morality, common to all nations and all governments, and adapted to all climates. Man cannot be ignorant of the rights of man, for they are neither the result of the ambiguous maxims of the moralist nor the useless and unproductive meditations of the philosophers; they are the dictates of universal reason, and of that moral code which the Author of Nature has imprinted on the heart of every individual of the human race, holding to every one the same language, prescribing, in all ages and at

[1] Chap. iii.

all times, the same duties. The Law of Nature is inseparable from the nature of thinking beings; it subsists, and will subsist for ever, in defiance of the passions which obstruct it, the tyrants and impostors, who would obliterate or annihilate it in blood and superstition.[1]

Filangieri then enters into a consideration of the acknowledgment of the principles of right, as found developed amongst different nations. In this comparison there is much to condemn. He says the savage of Nova Zembla or Otaheite is aware, as well as Locke, that he has no right to the beast killed at a distance in the chase by one of his tribe—that the produce of the soil belongs to the person who cultivates it, and cannot be transferred to him without the consent of the proprietor, and that the life of another cannot be taken by him, except in defence of his own. These propositions cannot be taken as absolutely true in the sense alleged by Filangieri. The savage in the lowest stage does not recognise his neighbour's rights to life, liberty, and property. The first recognition of these rights extends to the family; the next to the tribe; but ages in the history of the human race elapse before the absolute rights of one tribe are acknowledged by another, or before it is considered wrong for one chief to carry fire and sword into another's territory.

Next are considered the relative goodness of laws,[2] and the decadence of codes.[3] The seventh chapter is upon the obstacles to a change of legislation, and the means of surmounting them. The crude and undigested state of the laws of the great European nations in the time of Filangieri is ably painted. Composed of the laws of the Roman people—at first free, but afterwards slaves—a code compiled by an opinionated civilian, in the reign of a feeble emperor—confounded with an immense number of local and contradictory edicts, with the decisions of courts frequently eluding those very edicts, and with a variety of barbarous customs, originating in the ignorance or caprice of feudal anarchy, and incompatible with

[1] Chap. iv. [2] Chap. v. [3] Chap. vi.

the revolutions to which the world has been subject—this heterogeneous system requires little trouble to bring it into disrepute. It has lost, indeed, its hold upon the public mind so much, that except the Ecclesiastical Courts, who consider its records as sacred as the mysterious oracles of the ancient Sybils, all desire Legal Reform.[1]

A Ministry of Justice is advocated by Filangieri. Except where a whole people at the same time become discontented with their government, and passionately in love with liberty, the progress of a revolution in the legislative system is slow, and consequently there is opportunity for reformation. A censor of the laws appears adapted to the work. A magistracy of this kind, composed of the wisest and most experienced persons in the state, might have the greatest influence on the perpetuity of the legal system. Every law is attended with defects. Time makes a discovery of these; but time neither diminishes nor destroys them; and the government is generally the last to perceive them. A censor of laws would properly discharge this duty.

Another advantage to be reaped from such an office would be the prevention of a multiplicity of laws. Filangieri's observations on this topic may be usefully extended to the present time. The moment an evil appears, a new law is immediately introduced. The object is to apply to a particular case, though the old laws might be extended to it with a trifling alteration. Such, says Filangieri, is the origin of the immense number of laws which oppress the Courts of Europe, and render the study of its Jurisprudence as laborious as that of the Chinese language, which is scarcely to be learned in twenty years.[2]

The relative goodness of laws consists in their relation to the state where they are to be carried into execution. In reference to this topic, Filangieri discusses the distinctions between the various forms of government—monarchical, aristocratic, and democratic. The question as to secret debates and vote by ballot in a popular

[1] Chap. vii. [2] Chap. viii.

assembly, Filangieri decides in favour of publicity. Votes when public are most free from corruption; the questions for deliberation are more fully discussed; and finally, when public, the people have the benefit of the sentiments of the principal citizens, and have an additional guard against the double sacrifice of their virtue and the welfare of their country.[1]

The nature of a monarchy requires an intermediate rank of persons between the monarch and the people, though without any power whatever, as an equilibrium, and a depository of the laws, as a species of mediator between the sovereign and the subject. The nobles form this equilibrium, and the magistrates are the depositories of the laws.[2]

The constitution and the splendour of a monarchy also require a body of nobility, which may reflect upon the nation the lustre it receives from the throne. This body of the nobility should form a separate barrier between the monarch and the people, and weaken the violence of any rude and fatal shocks which these two bodies might otherwise receive from each other without this immediate restraint.[1]

Exclusive of the three great species of government, there is one which is not either a monarchy, an aristocracy, or a republic, but a mixture of these three several constitutions. Filangieri writing as an Italian, and possessed of the idea of a beneficent despotism, does not approve of the mixed government which has been one of the great elements in the prosperity of England. "Such a mixed government," he says, "where it is not well regulated by its laws, appears more likely to partake of the inherent vices of each, than of their united advantages. It has been the fortune of this government to be more extolled than analysed. Montesquieu did not perfectly understand it, and it is exposed to a danger which he did not foresee, and from which the other governments are wholly exempt. It may end in despotism, without any visible alteration of the constitution,

[1] (Translation, vol. i. p. 77). [2] Chap. ix. (ib. p. 92). [3] Chap. ix. (p. 96.)

and the people may one day become a prey to real tyranny, without the loss of apparent liberty. This is the government which for a century has fixed the attention of Europe; it is the government of Great Britain, where a good prince is able to do nothing without the consent of the nation, and a bad one might betray it; where the voices of a majority of the representatives of the people do not always correspond with their wishes, and its supposed liberty has in some instances degenerated into licentiousness."[1]

Filangieri, in the tenth chapter, considers more fully the question of a mixed government, and as its most striking example, the government of England. A mixed government may be said to be a government where the sovereign power or legislative authority is in the hands of the nation, represented by a public assembly divided into three bodies, the representatives of the people, the patricians, and the king.[2]

Considering a mixed government in this light, there seem to be three inherent defects in its constitution; the independence of the executive power of the body which ought to be its superior,—the secret and dangerous influence of the prince in the assembly of the bodies which represent the sovereignty,—and the instability of the constitution. Legislation ought not to change the essence of a constitution, it should endeavour only to correct its defects. All the principles thus dependent on the relation of the laws to the nature of this government should be directed towards a choice of the proper means of preventing these three vices. It is not necessary to review in detail the comments made by Filangieri upon the constitution of Great Britain as the representative of the mixed form of government. But it is very questionable whether what he terms the last inherent defect in the constitution—the continual fluctuation of power in the different bodies that divide the administration—be so dangerous to the country, or so deserving of censure.

[1] Chap. ix. [2] Chap. x. (Translation, p. 100.)

In all governments of the world the power of creating, abolishing, and changing the laws of the nation is the exclusive right of the nation itself. This power is united to the sovereignty in those governments alone where the sovereignty is vested in the hands of the people at large. It is only in popular and mixed governments that the whole nation is the sovereign, and in these two governments the sovereignty may consequently change or alter the constitution at pleasure. The exercise, indeed, of this authority is rare, because there is no clash of the different forces or interests of the different bodies amongst which the different shares of power are distributed. In mixed governments, where the different bodies share the authority, each is in perpetual anxiety to extend its own portion, and the body which represents the sovereignty, and possesses the power of disposing of the constitution, has always an interest in altering it, either by increasing its own share of power, or diminishing it, to gratify the members, who can amply repay it for such a temporary sacrifice. The constitution, therefore, can never be fixed and certain.

On the other hand, again, it may be contended that the very facility for change in the constitution assists the progress of the nation. Filangieri then considers the methods for providing against this defect, and applauds the policy of the English legislature in rendering the judges independent of the Crown. He considers that equal care has not been taken to combat the other two defects inherent in mixed governments. What remedy has been opposed to the secret influence of the sovereign in Parliament? There are, it is true, some measures taken to prevent in the election of the Members of the House of Commons a choice of persons assuredly devoted to the sovereign. But when Members are once elected, new hopes and expectations are opened to them, and they may flatter themselves with the idea of succeeding to appointments which they never thought of in their private and original situation. Hope and ambition are more powerful stimulants than gratitude.

Filangieri, however, considers that the Crown has too much influence by the power of creating Spiritual and Temporal Peers. "These are all members of the sovereignty, and the king not being possessed of the whole sovereignty by the nature of this government, can he, without a political absurdity, communicate to others what he does not possess himself? Is not this a pernicious sacrifice of the legislative power in favour of the executive? Are not the principles of a free constitution apparently lost for ever when the most respectable part of the legislature is created by the executive."[1]

Filangieri then proposes a change in the mode of creating Peers. The House of Lords should exclusively enjoy this illustrious privilege. It should have the power of admitting into its bosom the individual who has rendered immortal services to his country. Patents of nobility, instead of being emanations from the prince, should be testimonials of national gratitude, and evidences of honour and virtue.

Again, when the infamous traffic in the sale of the votes of the lower classes of the people shall be effectually suppressed; when abilities and integrity regularly influence their choice; and when the laws exclude indigence, which is always suspected of venality, from the right of electing, the nation will be truly free, and the possibility of an united assembly of spirited and independent patriots will be demonstrated.[2]

Filangieri then concludes the tenth chapter with the following eloquent appeal to the English nation in reference to Law Reform:—"After having instructed, enlightened, and astonished Europe with your inventions, your arts, your productions, and your wonderful discoveries, is it possible your legislation should be so obscure? Formed out of many barbarous absurdities of your ancestors; of the extravagance of the Gothic feudal system, in direct opposition to the principles of your adorable liberty; of usages and customs whose origin is not even known; of new laws often contradicting old

[1] Chap. x. (Trans. vol. i. p. 129.) [2] Chap. x. (Trans. vol. i. p. 132.)

ones; of the decisions of your courts with the effect of laws; of useful establishments united with destructive ones; of evils and their remedies; of numerous sacrifices for your independence, and as many instruments of despotism;—it appears to the eyes of the philosopher an immense mass of confusion, out of which it may be difficult to extract a remedy that would remove the defects of your constitution, and preserve your liberty."[1]

The eleventh chapter opens with a consideration of Montesquieu's opinion, that every form of government has its own predominant principle of action; and that Fear in a despotic state, Honour in a monarchy, and Virtue in a republic, are these ruling principles. But, on the contrary, the love of power is the primary and active cause in all governments. The origin of human actions is generally derived from two powerful stimulants—the love of pleasure and aversion to pain. On this supposition it may be easily discovered that the love of power originates in a love of pleasure.[2]

Every individual is desirous of being as happy as it is possible for him to be, and, consequently, is desirous of having in his own hands a power that may oblige others to contribute as much as they are able to his happiness. From this principle he wishes to command them. It is a passion, therefore, that is born with man,—it is inseparable from his nature,—it expands with social relations, and becomes the common cause of action in all civil bodies.[3]

A long disquisition then follows upon the Love of Power. The principal fault of Filangieri is that he borrows the historical illustrations almost entirely from ancient history. Writing before the French Revolution, and without an idea of the progress to be made by the advanced nations of Europe and America in the nineteenth century, this was, perhaps, unavoidable.

Filangieri considers that the first law which protects, directs, and renders useful the love of power in free and

[1] Chap. x. (Trans. vol. i. p. 136.) [2] Chap. xi.
[3] Chap. xi. (Trans. vol. i. p. 140.)

popular governments, should leave to the people the choice of the person to whom any portion of authority is to be confided; the second is, that which extends to every individual the right of being able to acquire the first office and the first employment in the state, except he is ineligible by a legal disability, clearly specified by the laws, from his misconduct or his crimes. The necessity of such a law is evident. Admitting that every individual serves his country from the rewards it offers him, that the love of power is the first object of his hopes; and that the different degrees of authority conferred on him are the equivalent for his services, it follows, that when a part of the people is either wholly or partially excluded from these rights, the republic will be divided into two classes, one of which has not the smallest interest in the public welfare, and the other, every inducement to serve it.[1]

In the thirteenth chapter Filangieri reviews the observations of Montesquieu on the effects of Climate. Too much influence has been attributed to this cause of variety by the author of the "Spirit of Laws." The influence of climate on mankind is not to be considered as a positive or absolute cause, but a concurrent one. Still, as its effects are active both upon the physical and moral qualities, it deserves the legislator's attention. As these defects are, however, sometimes more perceptible, and at other times less; are more forcibly felt in powerful climates, and least in moderate ones, this diversity should have likewise a corresponding diversity in the legislative system. The general maxim that extremes meet, is strictly applicable to the influence of climate; for both in extreme hot and extreme cold ones the expansion of the moral faculties of man is equally impeded by the climate; in hot countries mankind is reduced to a state of great debility and stupidity, in cold to torpidity and sluggishness. What are the consequences to be deduced? That to communicate the political motives, which is the life of civil society, the laws should have the great-

[1] Chap. xi. (Trans. vol. i. p. 152).

est energy in powerful or hot and cold climates, and that in temperate ones the legislature may be satisfied with the removal of the few obstacles which oppose its views.

Where any particular species of industry, arts, or manufactures is opposed to the climate of the country, an attempt to promote it is a gross error. Notwithstanding the support, it in all probability remains imperfect. The hands sacrificed in such pursuits might certainly have been employed with greater profit to themselves, and advantage to the state, in other manufactures more congenial to the country. Supposing it even to be overstocked with them, the surplus might be exchanged in other nations, and supply it with what it did not itself produce. Is it possible for the arts and manufactures, which require a great degree of heat, to be exercised with emolument or advantage in a very hot country, or those which require the open air to be carried on with any prospect of success in a very cold one? What opinion would be entertained of the legislator who should propose to establish a glass manufactory at Zanguebar, and dockyards for ship-building on the coast of Lapland? Man too far removed from the equator or too near it, in a very hot climate or a very cold one, is incapable of that labour and those exertions which in a different climate he may undertake with ease. The "non omnis fert omnia tellus" may be also said of man. To oppose Nature in such situations would be an absurdity as useless as pernicious. Let the legislature, then, endeavour to correct the effects of climate when they are prejudicial; let it take advantage of them when they are useful, and let it respect them when they are indifferent.[1]

In the second book Filangieri discusses the various questions connected with Population. The great obstacles to the increase of the population of Europe are stated to be the unequal distribution of landed property,[2] the great number of great landowners,[3] the exorbitant

[1] Trans. vol. i. p. 199. [2] Book ii. chap. iii. [3] Chap. iv.

wealth and inalienability of ecclesiastical property,[1] excessive taxation,[2] the state of the military establishments,[3] and public incontinence.[4]

"Next to population," says Filangieri, "riches are the second object of political laws. There was a time when the laws had no other end than to form the hero, and poverty was the first step towards heroism. Riches were feared, and they were feared with reason. When riches were but the fruits of conquest, and were not acquired by the industry or exertion of the husbandman, the artist, or the merchant, they certainly corrupted the people, encouraged idleness, and hastened the decline of nations. This state of things is since materially changed. Plunder, and the tributes from conquered provinces, are not the present means of enriching nations. Incessant labour, activity, and industry are now the means; and those nations are the most rich which have their citizens the most laborious and the most free."[5]

The Administration that wishes to support the prosperity of a people and the national opulence, should only exert itself in removing the obstructions in the way of the public happiness, and should adopt the leading principle of governments—Interfere as little as possible; let every thing take its own course—Ingerirsi quanto meno si può: Lasciar fare quanto piu si può.[6]

Filangieri boldly advocates Free Trade in corn. The principal obstruction which impedes the progress of agriculture is undoubtedly the restriction laid on the commerce in grain of every species. Governments have erroneously believed that by the natural trade of a state, the provisions necessary for its own internal consumption might be carried out of the country. To stop the progress of this alarming evil the ports are shut, guards posted on the frontiers, and the clandestine exportation of any of the necessaries of life most rigorously punished. The expedient, notwithstanding, is fatal. It lessens the value of property, ruins agriculture, destroys commerce,

[1] Chap. v. [2] Chap. vi. [3] Chap. vii.
[4] Chap. viii. [5] Book ii. chap. ix. [6] Chap. xi.

impoverishes the country, depopulates the state, and creates a scarcity in Europe. Filangieri then enters into an analysis of the Corn Trade, and its effects upon scarcity and plenty; but the same subject has been more ably and fully handled by Adam Smith. The human race are the children of one vast family, scattered over the entire earth, and framed for mutual succour and support: the Great Author of vegetation has amply provided for every want of life. Commerce, unfettered by restrictions, supplies the necessities of one country by the superfluity of another, and by its regular communications is enabled to balance the periodical equilibrium of want and plenty.[1]

After expressing the opinion that the undue grandeur of capital cities is one of the principal obstacles to agriculture, in the seventeenth chapter of the Second Book Filangieri eulogizes commerce;—commerce, the tutelary genius of pacific nations, and the cradle of conquerors —commerce, which is always advantageous, but not always encouraged, has experienced an infinity of revolutions. In the remotest days of antiquity it flourished in Asia; it acquired new vigour in the hands of the Phœnicians; it founded a multitude of colonies, and transported to Sidon and Carthage all the riches of the ancient hemispheres. After having nestled for a long time within the walls of Athens, Corinth, Rhodes, and some other of the little Grecian Republics, it disappeared before the victorious legions of Rome. Under the irruption of the barbarous nations of the North it would have been wholly extinct, if Venice, Genoa, Pisa, and some of the small States of Italy had not preserved a part of it, which was secured by their insignificance. During the anarchy of the feudal system, it was very limited in almost all Europe; was confined to the simple traffic between one town or one village with another, and seldom extended beyond the province. After all these vicissitudes, it is again become the support, the strength, and the soul of nations.

[1] Book ii. chap. ii. (Trans. vol. ii. p. 21).

The obstacles of commerce are stated to be, first, the custom-house duties; next, a jealousy of commerce and of rival nations. A principle, not less unjust than false, as contrary to morality as civil polity, has unfortunately seduced the ministers who have had the interests of nations intrusted to their care. It has been a received opinion that a nation could not gain without another losing,—that one State could not enrich itself but at the expense of a different State; and it has been the grand object of Ministers to build the greatness of their own country on the ruins of another. This erroneous principle, which was the basis of the Roman and Carthaginian system of politics, and ruined these two Republics, has unfortunately introduced an universal jealousy of commerce in Europe; or, in other words, a secret conspiracy amongst its governments to ruin all, without enriching any. Filangieri then reviews the commercial laws of the different States of Europe. Convinced, then, of the existence of a strict and intimate connexion between the interests of any particular nation and those of all Europe, and with a conviction of the injuries to general and particular commerce from the jealousy or envy of nations, governments should exert themselves to correct that mischief. Abandoning their ancient prejudices, they should open their ports to all nations, and lay the foundations of universal liberty; without which commerce will be always timid from being under restrictions, and always languid because oppressed with the weight of its fetters. Kings and Ministers, who issue their orders for peace and war, should be satisfied of the important truth, that, in the political as well as in the physical world, every thing is connected, every thing is relative, every thing is dependent. The object of commerce is to unite all nations in a society, where every advantage may be enjoyed by all, as well as every right of traffic in every thing which they may mutually want. Every political barrier should be destroyed. All distinctions between one people and another are absurd, and ought to be rejected; they are fatal remains of ancient

prejudices, of barbarity, always destructive, but now disgraceful, in an age that believes itself, what, in fact, it ought to be,—enlightened. Let those federal leagues and treaties be abolished that have defence and invasion for their end; that force a people, who would be happy in the enjoyment of peace, to enter into the disputes of another nation, to ruin their commerce, to waste their treasures, and to spill their blood, often for the sole purpose of gratifying the ambition of a foreign prince, to defend his unjust pretensions, his supposed rights, a fraudulent or dubious title, his personal enmity, and sometimes even his folly. Those treaties of commerce should be considered as political abuses which contain so many seeds of war and discord, and those exclusive privileges that one state obtains from another for a traffic of luxury, or a commerce of subsistence, as acts of national injustice.

A treaty for the general freedom of industry and commerce is the only treaty that a commercial and industrious nation should consent to, or negotiate with any government. Every thing which is favourable to this liberty, is also favourable to commerce; every thing that restrains this liberty is prejudicial to it.[1]

There are two political extremes in Governments that are equally pernicious,—an excess of negligence, and an excess of vigilance. A wish to know every thing, to see every thing, to control every thing, is the source of as many mischiefs as supineness and negligence: in the knowledge of the just and proper medium between too great attention and too great indifference, too much interference and too much latitude, the whole art of Government consists. Filangieri condemns the system which the Governments of Europe had then adopted in their intercourse with their colonies,—the restriction to an exclusive commerce with the mother country. Two motives appear to have induced Governments to adopt this exclusive system—a desire of an increase of revenue from the duties on the imports and exports, and a desire

[1] Book ii. chap. xx. (Trans. vol. ii. p. 123).

of multiplying the whole commerce of their colonies, in order to monopolize the whole of its advantages. In both these plans the Governments have been mistaken. They supposed that indirect duties would be paid by the colonies whilst they have been paid by the mother country. And if the grand object of the prohibitory system be to procure the greatest profit to the mother country, from the monopoly of the commerce of the colonies, Governments have been equally mistaken. This wants but little illustration. If the mother country sells her merchandise, and purchases that of her colonies at the current price of the markets, the exclusion is useless and unnecessary. If she sells her merchandise at a higher and purchases theirs at a lower price, she ruins the colonies, and consequently their commerce. In proportion as this disadvantageous trade impoverishes them, their consumption of the produce of the mother country will decrease, and they will export less also of their own. It is the interest therefore of the mother country to grant an entire freedom of commerce to her colonies, as well as her other subjects.[1]

Filangieri discusses, as the last obstacle to commerce, the frauds of merchants and the frequency of bankruptcies. Confidence is the soul of commerce; and without confidence all the component parts of this mighty structure would crumble beneath it. Credit is the substitute for specie, without which all circulation would be interrupted, and every kind of traffic reduced within the narrow limits of a ready-money trade. The existing laws of bankruptcy in most continental nations at the time Filangieri wrote were too severe and too indulgent, condemned innocence, and offered impunity to real guilt. There are two kinds of bankruptcies—a voluntary or fraudulent one, and an involuntary or compulsory one. In the first instance, the insolvency of the debtor is merely nominal and apparent; and the effects which he cedes to his creditors are but a part of his property, the rest being either embezzled or

[1] Book iii. chap. xxii.

concealed. In the second instance, the insolvency is unavoidable. An accidental discredit, the loss of a ship, the failure of a correspondent, involves a merchant in unforeseen and immediate difficulties. The first is a voluntary failure, and a deception on the public; the second is a misfortune from an unexpected accident, which leaves the unfortunate only the comfort of his conscience, but is not always able to secure him from the censure of the world, the loss of character, and the rigour of the laws. These laws then inflicted the punishment of death on a voluntary and fraudulent bankrupt; but at the same time they condemned the unfortunate bankrupt to perpetual imprisonment.

But though fraudulent bankruptcies were of frequent occurrence, the rigour of the law was seldom put in force in England. Richard Town, a tallow chandler, was executed for concealing his effects, in 1712; John Perrot, for the same offence, in 1761; and Alexander Thompson, an embroiderer, in 1756, for not surrendering. This was the last occasion upon which any person suffered the extreme penalty of the law for an offence against the Law of Bankruptcy in England.

Filangieri then proposes the following reforms in the Bankrupt Law, most of which have since been carried out in England. Creditors should not have the power of determining the bankrupt's fate, but should solely interest themselves in discovering the best means of indemnifying themselves. Every other proceeding belongs to justice. As soon as the trader declares himself insolvent, the Government ought to secure his person. A rigorous examination should immediately follow, and a minute investigation of his papers and his conduct. If it is a fair bankruptcy, the bankrupt should be set at liberty, and the whole that ought to be required of him should be the transfer of his remaining property to his creditors. The means should be left him of procuring his future subsistence, and both his honesty and innocence should be stated to the public. If the failure be proved to be a fraudulent one, the culprit should in

every case be exposed to the just indignation of the law, and an infamous punishment might be very proper, expressive of the crime. Having forfeited the public confidence, he should be excluded from every respectable office and employment, and rendered incapable of any legal or civil act. Lastly, the punishment ought to be public, and with all the apparatus that can render the crime more infamous, and the punishment more terrible.

In chapter twenty-six of the "Science of Legislation," Filangieri discusses the encouragement which may be given to commerce after the obstacles to it are removed: the construction of roads and canals is the greatest encouragement that can be given to internal commerce and industry; bring men together, and you make them laborious and industrious, isolate them, and they are savages incapable of the idea of perfection to which they might attain. "Avvicinate gli uomini, evoi li renderete industriosi ed attivi: separateli, e voi li renderete tanti selvaggi incapaci d'avere l'idea stessa della loro perfettibilita."[1]

Another aid which commerce should receive from government is the regulation of the coin. External commerce, too, requires a navy for its protection; the sea is the channel by which the merchant transports his merchandise, the artist his manufactures, and the husbandman the produce of the earth; it is common territory to which all nations have an equal right.

Filangieri discusses the advantages of a navy above a standing army; on the sea the forces of a nation are conveyed to a distance without any risk except what arises from the elements; but if troops are to invade a country by land every thing opposes or retards their progress; mountains, rivers, bad roads, a want of provisions, the want of ammunition, and the inclemency of the weather, disconcert their projects, and multiply their dangers and difficulties. On the sea, soldiers are sheltered from the weather, and carry their artillery, their

[1] La Scienza della Legislazione, vol. ii. p. 90, ed. 5 vols. octavo; Filadelfia, 1819.

ammunition, their provisions, and every necessary along with them, over a smooth and level plain. Naval power includes universal respect, power on land gives only consequence with the neighbouring governments.

Public roads, canals, good regulations of the currency, and a sufficient force on sea, are the only encouragements which government should give to commerce. Commerce wants no other aid, private interest should complete the work. "Le strade dunque, i canali di comunicazione, il buon regolamento delle monete, una forza sufficiente sul mare, sono gli urti che ciaschedun governo dovrebbe dare al commercio. Egli non ha bisogno d'altri soccorsi. S'appartiene all' interesse privato il compir l'opera."[1]

Taxation is next discussed. Wherever there is society there must be a political body to govern it internally and defend it externally; this double care occasions expense, and it is just that the society which profits by it should defray such expense.[2]

Indirect taxes are real or personal: they may fall on persons or things, but they are in both instances equally contrary to the principles which should direct the legislature in its choice of impositions. Personal taxation seems to be simply confined to a capitation tax, which is no other than the seal of slavery impressed on the human face; it is arbitrary in its nature and in its application; this is plain, for the tax is either equal on every individual, or it has relation to his circumstance and property. In the first case it is unjust, because the poor man pays as much as the rich, and one part of the community is oppressed whilst another defrauds the State of what he should contribute to it. In the second case it is arbitrary and indeterminate, because it is to be regulated by the property of the individual, of which it is impossible to discover the amount. Is it to depend on the simple declaration of the possessor? To warrant a confidence in such a declaration, a species of moral conscience ought to exist which might unite the govern-

[1] Vol. ii. p. 98. [2] Chap. xxvii.

ment and the subject by the common tie of a reciprocal and enthusiastic attachment to the public interest.

Filangieri again argues against giving to tax collectors the inquisitorial powers which have not been attended with much injury or annoyance in the case of the Income Tax in England. He next argues against real taxes, or taxes on consumption. If they are laid on the internal consumption of articles of the first necessity, they must of consequence be pernicious, injudicious, and insupportable to one class of society; they must be pernicious because they render subsistence dearer without any advantage to agriculture, and because they diminish population, that is always in equilibrium with the means of subsistence; they are injudicious because the consumption of articles of the first necessity is as great with the poor as the rich.

Taxation on the necessaries of life deprives the manufactures of multitudes of artists, population of many families, agriculture of great consumption, and society of many useful citizens.

Duties on the importation of foreign manufactures have been authorized by the public opinion and prejudices of an ancient date. Weak politicians have supposed that the only means of encouraging national industry on the ruin of foreign industry is to prevent specie passing out of the nation for the purchase of foreign manufactures, and to restrain their consumption by an increase of the duties on them, which must increase their price; but they do not perceive that when less is sold to a country less will be purchased of it; commerce only yields what it receives, and consists in an exchange of value for value.[1]

In the opinion of Filangieri, a tax on land, or direct tax, is the true and lasting source of public riches and national revenue, and should bear the whole burthen of public contributions. "Il dazio diretto non è altro che una tassa che s'impone sulle terre. Vere sorgenti perenni delle richezze e delle rendite nazionali, dov-

[1] Chap. xxviii.

rebbero le terre sole soffrire tutto il peso delle contribuzioni."[1]

He enumerates its advantages—cheapness of collection, freedom from the rigour and extravagance of revenue laws, facility of distributing the tax, and the union of the interests of the government and the people.[2]

In the time of Filangieri, one-third of the revenue was lost in the process of collection by most of the governments of Europe. A direct tax on land would certainly be the cheapest in collection: when there is but one tax in the state, and this tax is laid upon the land, the people themselves may be the revenue officers, the principal persons may receive the different taxes of every individual, and remit them to the head of the province, every thing respecting the tax being fixed, permanent, and unalterable, neither fraud nor partiality can possibly exist. An exact and permanent rate will point out to the landowner the sum which he may have to pay to the state, and his whole dependence will rest on the laws and himself.

No doubt a land tax has some of these advantages; but the taxation of England exceeds the rental of England; and even if the whole rent of this country were appropriated for the purpose of taxation, it would still be necessary to have recourse to other sources of revenue.

The chapters on the distribution of riches are well considered. An exact distribution of the riches of a nation, or a perfect equality of fortune in every individual, cannot possibly exist but in the first days of an infant republic. Even if a certain number of families were united in society, and an equal portion of land were assigned to each, this state of society could not be lasting. Men have different degrees of industry, different wants; some have more frugality and economy than others, and by these means their property is increased or lessened; the subdivision of land is regulated by the number of children; and the right of directing the course of property by will tends to unite that of extinct

[1] Chap. xxx. vol. ii. p. 116. [2] Chap. xxxi.

families in a single person; lastly, as by force of attraction, money produces money, and riches add to riches, a preservation of the first state of society is utterly impossible; riches, however, should not be confined to a few persons while the rest of society remains in indigence. The present state of society in Europe, says Filangieri, may be divided into two classes, one of which wants the necessaries of life, and the other abounds in its superfluities; is it impossible to diminish the riches of one class of individuals and to increase those of the other without a violation of the sacred rights of property, or the eternal principles of justice? When the real causes of the inequality are discovered, the means of removing it may not be very difficult; every thing tending to restrain or reduce the number of proprietors in a state tends at the same time to preserve and encourage this unfortunate disproportion; these were the effects of trusts, entails, and primogeniture, but agriculture, population, and industry, would feel a great advantage on their abolition, and in the subdivision of the land.[1]

Luxury is the use made of riches of industry to procure a pleasing existence by means that usually contribute to the advantages of life or the pleasures of society. Luxury is the means of the distribution of riches, and as such is a public benefit; it animates industry, inspires a love of employment, preserves riches in a state, softens the manners, creates new pleasures, and opens to society the treasures which nature has scattered in a thousand distant and different climates, or concealed under the sea or in the bowels of the earth; by its means the laborious workman and experienced artist acquire property, it unlocks the coffers of the rich, it refines and multiplies art and manufacture, rouses genius, and encourages agriculture by the exchange of its produce for the articles of taste and fashion.

The progress then of luxury ought not to be an object of apprehension, because if the manners of society are preserved in every class it will be only a necessary spur

[1] Chap. xxxvi. [2] Chap. xxxviii.

to opulence and the effect of the general welfare of a nation.

Such, says Filangieri, in his conclusion of the second book, are the principles and truth which appear to want elucidation in the science of legislation respecting political and economical laws: their object ought to be the multiplication of the number of inhabitants in a state, a provision for their subsistence, and the introduction, preservation, and distribution of riches with the least inequality possible.

The philosopher should be the apostle of truth and not the inventor of systems, but the idea that every thing has been already said is the idea only of men without genius or without courage to express their sentiments; the evils which afflict humanity are not yet removed; errors and prejudices which perpetuate errors have their advocates and partisans; truth is known but to a few privileged individuals, and is still kept at an awful distance from the thrones of kings. It is the duty of the scholar and the sage to endeavour to eradicate the former, and to proclaim, support, and to illustrate the latter; if the lights they scatter are not useful in their own times and in their own country, they may enjoy the certainty of having served other countries and succeeding generations; citizens of the world, they are contemporaries of every age, the earth is their school, and posterity will be their disciples. "Il dorere del filosofo e di predicarla, di sostenarla, di promuoverla, d'illustrarla. Se i lumi che egli sparge non sono utili pel suo secolo e per la sua patria, lo saranno sicuramente per un altro secolo, e per un altro paise."[1]

I have now reviewed the writings of the three principal Italian jurists during the eighteenth century. Their works were without fruit in Italy, the decline of the nation was visible everywhere, notwithstanding an appearance of tranquillity. Genoa fell—Venice fell,—philosophy was gained over to despotic princes, and the Sovereign Pontiff made his journey to Vienna in vain

[1] Vol. ii. p. 190.

to enlighten Joseph II. on the true interests of royalty. At Florence, the race of the Medici was surrounded by favourites and courtesans, and the last Italian duke saw the powers of the North dispose of the succession to his crown. Henceforth Italy, down to the moment at which I write, figures but as a compensating weight in the equilibrium of Europe, and finds its last resources only in the ties which unite it to the European society of nations. Sardinia alone of the Italian nations has a parliament, a national press, and a national army. In the South of Italy Naples appears to be preparing for a bloody revolution, in which, whenever the middle classes obtain political power they will certainly follow the example of the English execution of Charles I., and the French execution of Louis XVI.

At the close of the seventeenth century Italian literature fluctuated between the ancient municipalisms, the French influence, and the restoration of ancient Italian poetry; science was divided between the recollections of the school of Machiavelli, the individual recollections of the sixteenth century, and the ideas of modern Europe. In the eighteenth century French influence was redoubled, and the old national spirit disappeared before the power of foreign ideas. The individuality of Campanella attained an exceptional height; but Filangieri does not surpass Montesquieu, Beccaria is not superior to the Encyclopedists, Carli only readjusted the archæological theories of Bailly. The exterior form of thought in Italy resulted from this anarchy of Italian and foreign ideas. In the eighteenth century the Italians despised this rapidity of modern style which is disentangled from the burthen of erudition; they could not persuade themselves that it was possible to treat with so much lightness the gravest ideas of civilization; the very language of the Italians appears reluctant to yield to the forms of modern logic. Overwhelmed by the poetical riches of the sixteenth century, having no capital city in which to be developed, reduced to the contested purism of Florence, the Italian language found itself separated from

thought, invaded by all kinds of Gallicisms. Hence the generality of writers want vivacity even when they express themselves well—they appear rarely masters of the language—we always perceive that they write in a dialect which is not spoken. On the other hand there is amongst them a class of writers who have set themselves as a task to overcome the difficulties of the language, to preserve the purity of the sixteenth century. However, these persons have neither genius nor ideas, they are neither poets nor thinkers, but mere prosers. Thus the writers are distinguished from the thinkers, and the latter we see overcome by the exigencies of a dead language, tyrannized over by the phrases of another epoch. They either add to the corruption of the language by the negligence of their works, or else invent an individual variegated style by means of an arbitrary terminology. In these two cases they have neither the force and the life of Machiavelli, nor the elegant laconism of Montesquieu and the French philosophers. For these reasons Filangieri moulded his periods on the prose of Rousseau; Stelliki wrote his four great volumes in quarto upon Ethics in the fine Latinity of Cicero; and Vico created for himself an energetic language, but obscure and arbitrary, overlaid with Neapolitan provincialisms and corrupt Latinity. The French influence extending in Italy awoke the indignation of the nationalists; all the prejudices of despotism united with that of nationality to struggle against the French ideas. Alfieri displays the old genius of municipal Italy steadfast in its individuality, and not understanding the Europe which engulphed it. This prejudice accuses France of that which makes her greatness—accuses her of being a nation—of understanding her great men—of following them—and of being ONE by means of a strict uniformity of ideas and of passions. With Alfieri this is the degradation of man, he does not understand the French Revolution—the logic of insurrection—order in the midst of crisis—he wishes for a revolt of slaves, a people of Bruti, the exploits of Charlotte Corday, and he accuses the French of

being base because they do not assassinate Robespierre. Duni has used many of the ideas of Vico. Duni has treated of universal law in two works,—one on Law, the other on the History of Rome; they are only compilations; in his hands the Roman history of Vico is only a series of ingenious conjectures. In his essay on Law he never grasps the lofty conception of physical law which would strive to attain metaphysical law through all the revolutions of history. Filangieri also seized with much address some ideas of Vico, and in his science of legislation, we find notes on the savage feudalism of the primitive family, on the revolution of the serfs, and on the patrician victory which is organized in the town. We see there also mythology explained by the struggles of the fathers to conquer the earth and men. These are the facts borrowed from Vico, but Filangieri did not proceed further; the disciple of Montesquieu did not understand the fatalism, the chain of social revolutions, and in spite of his reading of the "New Science," he left the legislator dehors the people, the philosopher dehors the masses, and delivered the human race to the mercy of some privileged intelligences. The eighteenth century attempted to destroy half of the theories of the New Science; the nineteenth attempts to pass beyond them. What remains of the theories of Vico—his philosophy, his ideal history, and history properly so called? Vico has explained Man and History by a twofold physical and metaphysical theory. The ideas of Plato figure in the metaphysical or spiritualist part; they are the causes of Right, Morality, and of Truth. But the school of Locke has annihilated them for Sensation; the physiological school of Gall has reduced them to Instincts; that of Reid to Sentiments; the German school to Liberty, Conscience, Idea; and in all these four hypotheses the spiritualist theory of Vico falls under the materialist and rationalist criticism of the eighteenth century. Pre-established harmony is the bond which unites the opposite portions of the system of Vico, and, by an admirable transition, it transports into history psychological laws,

and considers the Roman law as the historical realization of the ideas of Plato. Here the errors of the philosophy of Leibnitz are reproduced with a development of grandeur and contradiction. The physical theory predominates; it explains the greatest part of Jurisprudence, all that escapes the rationalism of Grotius; it contradicts the Platonic ideas by a mechanism entirely sensual. But, on the other side, the spiritualist theory tyrannizes over all history; it imposes its Platonic image on all the stages of society. Vico's Platonic triad of Augury, Marriage, and Agriculture, the prescience of the primitive language which conceives its essence in the action of eating, and substance in the attitude of rest—all this is philosophic childishness. Vico's ideal history is only the generalization of the history of Rome. Whilst Vico is the historian of Rome he is sublime; beyond that, there are few of his generalizations that are not errors. When he goes backward from the patrician state to the state of nature, he makes the history of the savage who marries and improvises religion, society, agriculture, at the moment he is terrified by the thunder. To create the first government, he imagines that men wearied with savage life are willing to submit themselves to the tyranny, and to cultivate the land for their masters. All this hypothesis is absurd. And if we compare it with the theories of Condillac, Condorcet, Boulanger, David Hume, and others, we will find it inferior to all that has been written on the history of society. Once that Vico arrives at the patrician state of Rome, he recovers his genius; he attains the traditional grandeur of the school of Italian jurisconsults; but when he generalizes the progress of Roman Democracy, he knows not how to seize the characters which are reproduced on the surface of every social struggle. Like Machiavelli, he points out some resemblances between Sparta and Venice, Augustus and modern kings. But all history is falsified; even denied by the ideal history. Vico did not see that the Christian religion has been one great cause to substitute universal association for the association of a city

or a nation. He reckons as nothing the tradition of the arts and sciences—the great discoveries of the compass, of printing. With him all the progressive innovations which have changed the face of the earth produce no impression on the ideal history. Few great writers have had more genius than Vico, but few have reduced more errors to a system.

CHAPTER II.

THE FRENCH SCHOOL OF LAW AND JURISPRUDENCE IN THE EIGHTEENTH CENTURY.

1. Jacques Godefroy[1] followed at Geneva the path of Cujas, and edited a learned edition of the Theodosian Code. Under the title of *Manuale Juris* he published a valuable summary of the Roman law. At Geneva he supported the study of Jurisprudence. But Jurisprudence was still understood to imply only the study of the Civil Law of the Romans; the idea of a science of law was not yet developed. Antoine Favre,[2] president of Chambery, near Geneva, occupied with distinction the connecting link between the age of Cujas and that of Domat.

Science had now begun to decline in the great juridical schools founded by the middle ages. The French, German, and Italian schools of Jurisprudence, celebrated for their study of the Civil Law, had played out their parts. The details of private law now began to be illustrated by distinguished men writing in a popular style. But under Louis XIV. neither the Philosophy of Right nor Political Law is represented by any jurist. Domat[3] undertook a system of Civil Law, assuming for his elements the Roman Laws, the ordinances of the

[1] Jacques Godefroy, 1587–1652. Codex Theodosianus. Lyons, 1655, 6 vols. fol.

[2] Antoine Favre, b. 1557, d. 1624. Conjecturarum juris civilis, (1580); De erroribus Pragmaticorum, (1598); Rationalia in Pandectas, (1604); Codex Fabrianus, (1606.)

[3] Domat, b. 1625, d. 1695. Les lois civiles dans leur ordre naturel. (Paris, 1702, 2nd ed., 2 vols. fol.)

French kings, and the maxims of the French Common Law; he arranged the body of the law by system and method.

His fundamental proposition was that God having destined men for society has established certain ties or connexions which bind and oblige them in their intercourse with one another. The order of society is preserved by those *engagements*, and is perpetuated by the series of *successions* by which the living take the place of the dead. Domat, therefore, abandons the Roman division of Law into persons, things, and actions, and divides the whole of private law into two great parts, engagements and successions. Engagements are of two kinds —first, those which are common to all, and do not form in each individual any single relation binding him to one person more than to others; secondly, those by which God binds certain persons to each other more nearly, and determines them to perform to each other duties which no one could perform equally towards all. These particular engagements are of two kinds—those which are formed by marriage and birth, and constitute the natural connexions of family and kindred, and those other multifarious engagements by which men have communication with each other in the intercourse of life, with regard to their labours, their mutual aid, and the use of external things. Successions are either legitimate or in virtue of law from the intestate, or else they are testamentary. The latter comprehend every species of testamentary instrument. The principal defects of the arrangement of Domat are, that property and other real rights are in a great measure omitted, and the personal obligations arising from the connexions of family are not fully unfolded. Domat's great division of law into engagements and successions is arbitrary and incorrect; it does not embrace or exhaust all the constituent parts of private law, although it is true that society is preserved by engagements, and that order is perpetuated by the successions which call certain persons into the place of those who die.

Whilst Domat, as president of Clermont, divided his life between the pursuits of science and an obscure practice, Louis XIV. and his ministers were busied with the scheme of reforming justice. Colbert[1] and Passort drafted many ordinances:—Civil Procedure, 1667; Criminal Procedure, 1670; Commerce, 1673; Ecclesiastical Jurisdiction, 1695. These contain many useful historical expositions as to the development of private law in France.

D'Aguesseau[2] was born at Limoges, in 1668. He early devoted himself to the study of the law, and his elevation in life was most rapid. He was named avocat-general by Louis XIV. in 1691, and procureur-general in 1700, being then only thirty-two years of age. In these eminent positions he displayed talents of the most varied kind. The Regent Orleans appointed him Chancellor of France in 1717. But having refused to sanction the Bank of Law, he was disgraced and removed from the Court. After the disgrace of the Chancellor, Law's Bank was named the Bank of the King. All the finances of the state were made subservient to the scheme. The gigantic bubble burst in 1720, ruining thousands. Government sought means to restore public confidence. It was determined to recall D'Aguesseau to power. He was again disgraced in 1722. But the seals of office were restored to him in 1737, and he continued to be Chancellor of France from that time until 1750, the year before his death.

D'Aguesseau had many advantages to aid him in the study of Jurisprudence. He was a practising lawyer, attorney-general, an author, and a legislator. He was a man of wonderful erudition and labour. He knew how necessary it was to reform the French Code. This he thought to accomplish by particular ordinances on the principal points of civil law, rather than by concentrating reform in the general code. From 1729 to 1748 many ordinances were drawn by him. Duclos relates

[1] Colbert, b. 1619, d. 1683.

[2] Henri Francois D'Aguesseau, b. 1668, d. 1751. Œuvres completes du Chancelier D'Aguesseau; 16 vols. 8vo. Paris, Fantin et Cie, 1819. Histoire de la vie et des Ouvrages du Chancelier D'Aguesseau, par Boullée. Paris.

in his memoirs that the Duc de Grammont one day stopped D'Aguesseau to ask of him if there were no means of abridging procedure, and diminishing the expense. "I have often thought of it," replied the Chancellor; "I have even commenced a regulation on the subject; but I have been stopped by the consideration of the number of advocates and attorneys that I was going to ruin!"

D'Aguesseau appears also to have had the very great merit of clearly pointing out the difference between the Law of Nature and the Law of Nations—between the *jus gentium* and the *jus inter gentes*. He says:—"Que me reste il, apres avoir eclairci toutes mes idées sur ce point, si ce n'est, d'en tirer des consequences generales, qui renferment tout ce qui est essentiel au Droit des Gens soit par rapport a la conduite, que les nations doivent suivre, les unes a l'egard des autres, soit par rapport aux regles que chaque nation a interet d'observer, dans sa sphere particuliere, et ne considerant, que les peuples, qui y sont compris? Je commence par les premieres qu'on pouvoit appeller, le Droit qui doit s'observer, entre les nations, ou jus inter gentes, par une expression plus propre, et plus exacte que le terme general de Droit de Nations ou de Jus Gentium, terme qui peut avoir un autre sens."

The greater part of the voluminous works of D'Aguesseau are composed of his speeches on trials, the pleadings of causes, and legal papers on the details of public business. In the series of essays entitled "Meditations Metaphysiques sur les vraies ou les fausses idées de la Justice," he attempts to solve the important question whether man finds in himself the natural ideas of the just or unjust; and whether it is in conformity with those ideas that he judges of the justice or injustice of moral actions. Late in life he projected the codification of the laws of France. He planned the work in three great divisions—the subject matter itself of Jurisprudence, the form of judicial procedure, and the conduct and discipline of the officers of justice, judicial and executive.

D'Aguesseau was unquestionably the most distinguished of the great officers of state produced by the French system of Parliaments and Judicature before the Revolution; but it cannot be said that he advanced the Science of Law. The greatest value of his voluminous works lies in their affording abundant materials for the general history of the manners of the age.

Pothier[1] was only a writer of text-books. He united in these the Roman and French Laws. He is the Rollin of French Jurisprudence, as M. Berville, a cotemporary, has happily called him. In the Roman Law he observed the order of the Pandects, but distributed its texts following a rational order. Pothier died in 1772, before Kant, and before the French Revolution. Superior to Heineccius[2] and Bach[3] in his cultivation of the Roman Law, he is the best representative of the schools antecedent to the historical school of Hugo and Savigny.

In his treatises on Civil Law and French Jurisprudence Pothier laid the foundation of the French Codes commenced by the Republic and completed by Napoleon. He also undertook and completed a new digest of the Roman Law in methodical order. This work is a record of vast erudition and labour, but has little interest for us. However, under the last title of his new arrangement of the Pandects he attempted a general classification of the component parts of law.

This last title of Pothier's Pandects is termed De Regulis Juris, and is divided into five parts. The first part expounds, 1st, those general principles of law which are not peculiar to any particular matter or department of law; and 2ndly, those rules which relate to the constitution or establishment, force, interpre-

[1] Pothier, b. at Orleans, 1699, d. 1772, Professor at Orleans. Traitès de Droit Civil et de Jurisprudence Francaise; Pandectæ Justinianeæ in Novum Ordinem Digestæ. Works, 4 vols. 4to. 1744.

[2] Heineccius, b. 1681, d. 1741, Professor at Halle, and Frankfort on the Oder. Elementa Juris Civilis Secundum Ordinem Pandectarum; Frankfort, 1748. Works, 8 vols. 4to. Geneva, 1744.

[3] Bach, b. 1721, d. 1759, Professor at Leipzic. Comment. de legibus Trajani, 1747, 8vo.; Historia Jurisprudentiæ Romanæ, Leipzic, 1806, 8vo.; Opuscula ad historiam et jurisprudentiam spectantia, Halle, 1767, 8vo.

tation, and publication of laws. The second part, De Personis, explains, 1st, the various divisions of persons, with reference to their state and condition ; 2nd, the various qualities of persons which require to be regarded in law, such as sex and age ; 3rd, the various rights to or over persons, such as the power of the father or the master; 4th, the various family connexions of persons, including marriage and divorce.

The third part, De Rebus, commences with the old division, borrowed from the Civil Law, of things of divine right, and things of human right. The latter are again divided into four classes, common, public, belonging to corporations, and to individuals—res privati juris. Things of private right, or belonging to individuals, are again divided into corporeal and incorporeal. Under res corporales are considered possession, property, and prescription. Under res incorporales are included, 1st, Servitudes ; 2nd, Pledge and Hypothec ; 3rd, Civil Inheritance, or Succession, whether testate or intestate ; 4th, Bonorum possessio, or prætorian succession ; 5th, Jus crediti, seu de obligationibus, embracing the whole law of debtor and creditor.

The fourth part treats of Judicial Procedure, Civil and Criminal. The fifth treats of some heads of Public Law. This classification has been considered to have the merit of treating under a separate head, the connexions of Family—De variis personarum necessitudinibus; and its methodical explanation of judicial procedure has also been praised. Still it is merely an analysis of the Civil Law of the Romans, stripped of the details of the Roman system. The erroneous division of persons and things as the subjects of Law is continued ; Private is not sufficiently distinguished from Public Law ; the distinction between property in possession and property in action, the jus in re and the jus ad rem, is almost entirely effaced. And the influence of the erroneous division of things into corporeal and incorporeal is increased. Such are the chief errors of Pothier.

2. Montesquieu, 1689–1755.

Œuvres Completes de Montesquieu. Paris, Firmin Didot. 1846.

Charles de Secondat, Baron de Montesquieu, was born in 1689, in the Chateau de la Brede, within three miles of Bordeaux. His family was ancient and noble. In his youth he applied himself to the study of Civil Law. In 1719 he was made a councillor of the provincial parliament of Bordeaux, and in 1716 its president. In 1725 he opened the parliament in a speech, the eloquence of which proclaimed him as an orator. But Montesquieu, apparently, was devoid of ambition to shine in the practical struggles of life, and preferred the ease of the library to the tumult of the forum. He resigned his honourable post in the following year. Louis XIV. died in 1715, and three years afterwards the spirit of the eighteenth century appeared under the tragical physiognomy of the Œdipus of Voltaire. In 1721 Montesquieu published the Persian Letters. Lerminier has observed, that Montesquieu published the work that was the best adapted to the instincts of his age, and the work which was the most opposed to them, the Persian Letters and the Spirit of Laws. In the Persian Letters he has admirably expressed the humour of his cotemporaries, at once frivolous and profound, and by raillery driving order into ruin. Thus, at the appearance of the Persian Letters, there was a cry of enthusiasm and satisfaction. It was the book of the century. Some years afterwards Montesquieu published his "Considerations sur la Decadence et la Grandeur des Romains," a work written in imitation of Tacitus, and which probably suggested to Gibbon his Decline and Fall of the Roman Empire. Montesquieu's great work, "De l'esprit des lois," was published in 1748. In it are displayed the refined and noble nature of his mind,—his love of mankind narrowed by no national or provincial prejudice,—his desire for the happiness of all,—his zeal for liberty. Having lived the better part of his life in the

ordinary retirement of a country gentleman in his chateau, he died in 1755.

On a perusal of the famous Spirit of Laws, we may judge how feebly and inefficiently the science of Jurisprudence was cultivated in the middle of the eighteenth century. The work, if now published in England, France, Prussia, or the United States, would excite no attention, and would be fortunate in escaping even ridicule. To what purpose, we say, as we read, has our author collected this farrago of the customs of barbarous nations, and with them obscured the genuine sentiments of liberty, and the true principles of science which he has inculcated. Montesquieu was the exact cotemporary of Vico. At the present day no one will hesitate to place the profound philosophy of the Italian far above the eloquent, but shallow, commonplaces of the French jurist. Yet, from his confused and provincial diction, from his difficult and involved style, as well as from inculcating principles far in advance of his age, Vico has remained comparatively unknown. Montesquieu has been the text-book of Universities. His style has been a model of classical French. And his liberal sentiments, never pushed to any impolite excess against the reigning powers, have augmented his fame on all sides. But the importance of Montesquieu as the founder of a school, as the first of the French publicists who carried their bold researches into every portion of the domain of Civil and Political Right during the latter half of the eighteenth century, can hardly be over-estimated. In his investigation of politics Montesquieu pursued the plan which Machiavelli first introduced, of pursuing the empirical method without any reference to the controlling power of Providence. The French school followed in the footsteps of their master. Convinced of the absolute and equal rights of each individual of the human race Voltaire and Rousseau attacked political despotisms; sometimes, carried away by extravagant tendencies, their minds soured by exile and misfortune, they attacked the fundamental principles of all government. Mably and Quesnay, less

ardent, followed up the investigation. And the series terminates with Mirabeau, Condorcet, Sieyes,—the French Revolution,—the Code Napoleon.

In the preface of the Spirit of Laws Montesquieu tells us that he was engaged on the work for twenty years. Plato thanked Heaven that he was born in the same age with Socrates. Montesquieu gives thanks that he was born a subject of that government under which he lived. This thanksgiving shows that Montesquieu, immersed in his books, was thoroughly ignorant of the miseries of the French peasantry, the iniquities of the decaying feudal system, the corruptions of the court and aristocracy—all that produced the French Revolution.

The result of the considerations of Montesquieu on the progress of mankind has been, that amidst such infinite diversity of laws and manners, they were not solely conducted by the caprice of fancy. The histories of all nations are only consequences of first principles; and every particular law is connected with another law, or depends upon some other of a more general extent.

It is in the endeavour to instruct mankind that we are best able to practise that general virtue which comprehends the love of all. Man, that flexible being, conforming in society to the thoughts and impressions of others is equally capable of knowing his own nature whenever it is laid open to his view; and of losing the very sense of it when this idea is banished from his mind.[1]

Laws in their most general signification are the necessary relations resulting from the nature of things. Les lois dans la signification la plus etendue sont les rapports necessaires qui derivent de la nature des choses. There is a primitive reason, and laws are the relations which subsist between it and different beings, and the relations of these beings among themselves. God is related to the universe as creator and preserver; the laws by which He created all things are those by which He preserves them. As we see that the world, though governed by the motion of matter and void of under-

[1] Preface.

standing, subsists through so long a succession of its ages, its motions must certainly be directed by invariable law; and, could we imagine another world, it must also have constant rules, or must inevitably perish. These rules are a fixed and invariable relation. Between two bodies moved, it is according to the relations of the quantity of matter and velocity, that all the motions are received, augmented, diminished, lost. Each diversity is uniformity; each change is constancy. Particular intelligent beings may have laws of their own making; but they have some likewise which they never made. Before laws were made, there were relations of justice. For men to say there is nothing just or unjust but what is commanded or forbidden by positive laws, is the same as saying that before the describing of a circle all the radii were not equal.

Man as a physical being, is, like other bodies, governed by invariable laws—as an intelligent being he incessantly transgresses the laws established by God, and changes those which he himself has established. He is left to his own direction, though he is a limited being, subject, like all finite intelligences, to ignorance and error. Even the imperfect knowledge he has, he loses as a sensible creature, and is hurried away by a thousand impetuous passions. Such a being might every instant forget his Creator; God has, therefore, reminded him of his duty by the laws of religion. Such a being is liable every moment to forget himself; philosophy has provided against this by the laws of morality. Formed to live in society, he might forget his fellow-creatures; legislators have, therefore, by political and civil laws, confined him to his duty.[1]

Montesquieu, it will be observed, has no idea of the theory prevalent in some modern philosophy, that the very aberrations and vices of human nature are also the result of all compelling laws. But this system coincides with the Socratic principle that Virtue is Knowledge and Ignorance is Vice.

[1] Esprit des Lois, c. 1.

In the second chapter he considers the laws of nature in reference to the so-called state of nature pretended to be natural to men. It is unnecessary to consider those long exploded ideas. In the third he considers positive laws. These he divides into the law of nations:—political law, the laws relating to the governors and governed—and civil law, relating to the mutual communications of citizens. Most of the political definitions are borrowed from Gravina.

He then explains that the spirit of laws consists in the relations which the laws may have to things; and analyses at length the three species of government, republican, monarchical, and despotic. This analysis he gives in rather a confused manner. He necessarily treats of the three kinds of government[1]—that the laws of education ought to be relative to the principles of government;[2] that the laws given by the legislator ought to be relative to the principles of government;[3] and of the consequences of the different principles of the different governments with respect to the simplicity of civil and criminal laws, the forms of judgments, and the inflicting of punishments. Much of his political reasoning is antiquated; but his observations in the sixth book as to the simplicity of laws in different governments are very able.

Monarchies, by which term Montesquieu understands a constitutional monarchy as in England, do not permit so great a simplicity of laws as despotic governments. For in monarchies there must be courts of justice; these must give their decisions; the decisions must be preserved and learned that we may judge in the same manner to-day as yesterday, and that the lives and properties of the citizens may be as certain and fixed as the very constitution of the state.

In proportion as the decision of the courts of justice are multiplied in monarchies the law is loaded with decrees that sometimes contradict one another, either because succeeding judges are of a different way of

[1] B. iii. [2] B. iv. [3] B. v.

thinking; or because the same causes are sometimes well, and at other times ill defended, or in fine by reason of the infinite number of abuses that slip into whatever passes through the hands of men. This is a necessary evil which the legislator redresses from time to time.

But under despotic power there can be but little complication of laws. Despotic power is in itself sufficient; round it there is an absolute vacuum.

In the sixth book the punishments used by the different nations are reviewed. With respect to the torture he adduces the example of England, a nation blessed with an excellent civil government, where, without any inconvenience, the practice of racking criminals is rejected. It is not therefore in its nature necessary.[1] The Germans admitted of none but pecuniary punishments. These fiery and warlike people were of opinion that their blood ought not to be spilt but with sword in hand. On the contrary those punishments are rejected by the Japanese under pretence that the rich might elude them. But are not the rich afraid of being stripped of their property? And might not pecuniary punishments be proportioned to people's fortunes; and in fine might not infamy be added to those punishments? A good legislator takes a just medium; he ordains neither always pecuniary, nor always corporal punishments.

In the eleventh book he treats of the laws that form political liberty in regard to the constitution. He has some excellent observations upon the representative system of government. As in a free state every man who is supposed to be a free agent, ought to be his own governor; so the legislative power should reside in the whole body of the people. But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should act by their representatives, when they cannot act by themselves. The inhabitants of a particular town are better acquainted with its wants and interests than with those

[1] B. vi. c. 18.

of other places ; and are better judges of the capacity of their neighbours than of that of the rest of their countrymen. The member, therefore, of the legislature should not be chosen from the general body of the nation ; but it is proper that in every considerable place a representative should be elected by the inhabitants. The great advantage of representatives is their being capable of discussing affairs. For this the people collectively are extremely unfit. All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own.[1]

The thirteenth book discusses the relation which the levying of taxes and the greatness of the public revenues have to liberty. A correct definition is given of taxation. The revenues of a State are a portion that each subject gives of his property, in order to secure, or to have the agreeable enjoyment of the remainder. Les Revenus de L'Etat sont une portion que chaque citoyen donne de son bien pour avoir la suretè de l'autre, ou pour en jouir agreablement. The consequences of excessive and unjust taxation are shown. The effect of wealth in a country is to inspire every heart with ambition ; the effect of poverty is to give birth to despair. The former is excited by labour, the latter is soothed by indolence. Nature is just to all mankind; she rewards them for their industry, whilst she renders them industrious by increasing rewards in proportion to the greatness of their labour. But if an arbitrary power deprives people of the recompenses of nature, they fall into a disrelish of industry, and then indolence and inaction seem to be their only happiness.[2]

It is natural that taxes may be heavier in proportion to the liberty of the subject, and that there is a necessity for reducing them in proportion to the increase of slavery. In moderate governments there is an indemnity for the weight of the taxes, which is liberty.[3] Montesquieu, however, does not perceive the true reason for

[1] B. xi. c. 6. [2] B. xiii. c. 2. [3] B. xiii. c. 12.

this phenomenon. In the progress of society it becomes necessary to have a greater staff of public functionaries to conduct the affairs of a great and wealthy people. It is impossible for despotism long to exist save amidst comparative poverty and ignorance. If a wealthy and educated middle class existed in France the despotism of Louis Napoleon would be impossible. But the system of peasant proprietorship, and the subdivision of property arising from the French law of wills, have reduced the average of incomes in France to so low a scale that it appears there does not now exist a class capable of maintaining and supporting a free representative government.

The fourteenth book treats of the influence of climate, and commences with the general idea that if it be true that the character of the mind and passions of the heart are extremely different in different climates, the laws ought to be relative both to the difference of those passions and to the difference of those characters.

The fifteenth book treats of the manner in which the laws of civil slavery are relative to the nature of the climate.

Slavery is the establishment of a right which gives to one man such a power over another as renders him absolute master of his life and fortune. The state of slavery is in its nature bad. It is neither useful to the master nor to the slave; not to the slave because he can do nothing through a motive of virtue; not to the master because he, having an unlimited authority over his slaves, he insensibly accustoms himself to the want of all moral virtues. L'Esclavage proprement dit est l'etablissement d'un droit qui rend un homme tellement propre a un autre homme qu'il est le maitre absolu de sa vie et de ses biens. Il n'est pas bon par sa nature; il n'est utile ni au maitre ni a l'esclave, a celui ci parce qu'il contracte avec ses esclaves toutes sortes de mauvaises habitudes, qu'il s'accoutume insensiblement a manquer a toutes les vertus morales, qu'il devient fier, prompt, dur, colere, voluptueux, cruel.[1]

[1] B. xv. c. 1, p. 307.

Montesquieu thus pleasantly states the arguments used by the advocates of negro slavery :—

Were I to vindicate our right to make slaves of the negroes, this should be my argument : The Europeans being extirpated the Americans were obliged to make slaves of the Africans for clearing such vast tracts of land. Sugar would be too dear if the plants which produce it were cultivated by any other than slaves. These creatures are all over black, and with such a flat nose that they can scarcely be pitied. It is hardly to be believed that God, who is such a wise being, should place a soul, especially a good soul, in such a black, ugly body. The colour of the skin may be determined by that of the hair, which among the Egyptians, the best philosophers in the world, was of such importance, that they put to death all the red-haired men who fell into their hands. It is impossible for us to suppose these creatures to be men, because, allowing them to be men, a suspicion would follow that we ourselves were not Christians. Weak minds exaggerate too much the wrongs done to the Africans. For, were the case as they state it, would European Powers, who make so many needless conventions amongst themselves, have failed to make a general one in behalf of humanity and compassion ?[1]

The nineteenth book treats of laws in relation to the principles which form the general spirit, the morals and customs of a nation. It is necessary that the minds of a people should be prepared for the reception even of the best laws. Nothing could appear more insupportable to the Germans than the tribunal of Varus. That which Justinian erected amongst the Lazi to proceed against the murderers of their King, appeared to them as an affair the most horrid and barbarous. Mithridates, haranguing against the Romans, reproached them more particularly for their formalities of justice. The Parthians could not bear with one of their Kings, who, having been educated at Rome, rendered himself affable and easy of access to all. Liberty itself has appeared insupportable to those na-

[1] B. xv. c. 5.

tions who have not been accustomed to enjoy it. Thus a pure air is sometimes disagreeable to those who have lived long in a fenny country.[1]

There are two sorts of tyranny—the one real, which arises from the oppressions of government; the other is seated in opinion, and is sure to be felt whenever those who govern establish things shocking to the turn of thought, and inconsistent with the ideas of a nation. Il y a deux sortes de tyrannie; une reelle qui consiste dans la violence du gouvernement, et une d'opinion qui se fait sentir lorsque ceux qui gouvernent etablissent des choses qui choquent la manière de pensèe d'une nation.[2] Dio tells us that Augustus was desirous of being called Romulus; but having been informed that the people feared that he would cause himself to be crowned King, he changed his design. The old Romans were averse to a King because they could not suffer any man to enjoy such power; these would not have a King because they could not bear his manners. For though Cæsar, the Triumvirs, and Augustus were really Kings, they possessed all the outward appearance of equality, while their private lives were a kind of contrast to the pomps and luxury of foreign monarchs; so that when the Romans resolved to have no King, this only signified that they would preserve their customs, and not take up those of the African or Eastern nations.

Men are influenced by various causes, by the climate, the religion, the laws, the maxims of government, by precedents, morals, customs, from whence is found a general spirit, which takes its rise from these. Plusieurs choses gouvernent les hommes; le climat, la religion, les lois, les maximes du gouvernement, les exemples des choses passèes, les mœurs, les manières; d'on il se forme un esprit generale qui en resulte.[3]

In considering the question, what care ought to be employed lest the general spirit of a nation be changed, Montesquieu thus agreeably illustrates his proposition, by an eloquent description of the French manners. If

[1] B. xix. c. 2. [2] B. xix. c. 3. [3] B. xix. c. 4.

in any part of the world there had been a nation whose inhabitants were of a sociable temper, open-hearted, pleased with life, possessed of judgment, and a facility in communicating their thoughts; who were sprightly, agreeable, gay, sometimes imprudent, often indiscreet; and, besides personal courage, generosity, frankness, possessed a certain point of honour; no one ought to endeavour to restrain their manners by laws, unless he could lay a restraint upon their virtues.

A restraint might be laid upon women; laws might be made to correct their manners and limit their luxury. Yet by this means that popular taste might be lost which is the source of the riches of the nation, and that politeness which renders the country frequented by strangers.

It is the business of the legislature to follow the spirit of the nation, when it is not contrary to the principles of government, for we do nothing so well as when we act with freedom, and follow the bent of our natural genius. C'est au legislateur a suivre l'esprit de la nation lorsqu'il n'est pas contraire aux principes du gouvernement: car nous ne faisons rien de mieux que ce que nous faisons librement, et en suivant notre genie naturel.[1]

The more communicative a people are, the more easily they change their habits, because each is in a greater degree a spectacle to the other, and the singularities of individuals are better seen; the climate which makes one nation delight in becoming communicative, makes it also delight in change; and that which makes it delight in change forms its taste. The society of women assists the manners and forms the taste; the desire of giving greater pleasure than others establishes the ornaments of dress; and the desire of pleasing others more than ourselves establishes fashions.[2]

Vanity is as advantageous to a government as pride is dangerous. To be convinced of this we need only represent on the one hand the numberless benefits which result from vanity: for thence arise luxury, industry,

[1] B. xix. c. 5, p. 338. [2] C. 8.

arts, fashions, politeness, taste; and on the other, the infinite evils which spring from the pride of certain nations—laziness, poverty, and universal neglect. Laziness is the effect of pride. Labour is the consequence of vanity. The pride of a Spaniard leads him to refuse labour. The vanity of a Frenchman actively urges him to work better than others. All lazy nations are grave; for those who do not labour regard themselves as the sovereigns of those who do; and if we search amongst all nations we shall find, for the most part, gravity, pride, and indolence go hand in hand.[1]

Laws being the institutions of a legislator, and customs being the institutions of a nation in general, hence it follows that customs ought not to be changed by laws, but by the introduction of other customs. Thus some of the rigorous measures of Peter the Great are censured in reforming the Russian manners. He could have attained his end as well by milder methods. He himself experienced the easiness of bringing about these alterations. The women were shut up, and in some measure slaves, he invited them to court, sent them silks and stuffs, and made them dress like the German ladies. The sex immediately relished a manner of life which so quietly flattered their taste, their vanity, and their passions. Nations in general are very tenacious of their customs; to take them away by violence is to render them unhappy; we should not, therefore, change them, but engage the people to make the change themselves. All punishment which is not devised from necessity is tyrannical. The law is not a mere act of power; things in their very nature indifferent are not within its scope. En general, les peuples sont tres attachés a leurs coutumes; les leur oter violemment, c'est les rendre malheureux; il ne faut donc pas les changer, mais les engager a les changer eux memes. Toute peine qui ne devise pas de la necessitè est tyrannique. La loi n'est pas un pur act de puissance; les choses indifferentes par leur nature ne sont pas de son ressort.[2]

[1] B. xix. c. 9.

[2] B. xix. c. 14, p. 340.

Laws are best adapted to regulate the actions of the subject, and manners the actions of the man; the former principally relate to the exterior conduct, the latter to the interior. They have been often confounded—Lycurgus made the same code for the laws, manners, and customs; and the legislators of China did the same. The extensive legislation of the Chinese on the rules of civility is somewhat commended by Montesquieu. They desire that people should have a veneration for one another, that each should be every moment sensible how greatly he was indebted to others. This was a method of maintaining peace and good order, and of banishing all the vices which spring from an acerbity of temper. Civility is in this respect of more value than politeness; the latter flatters the vices of others, the former prevents our own from being brought to light. La Civilitè vaut mieux, a cel regard que la Politesse. La Politesse flatte les vices des autres et la Civilitè nous empêche de mettre les nôtres au jour: c'est une barrière que les hommes mettent entre eux pour s'empêcher de se corrompre.[1]

The laws ought to have a relation to manners and customs. Solon being asked if the laws he had given to the Athenians were the best, replied—"I have given them the best they were able to bear:"—a noble expression that ought to be perfectly understood by all legislators.[2]

The customs of an enslaved people are part of their servitude—those of a free people part of their liberty. Having already described the English constitution,[3] Montesquieu now proceeds to consider the effects which follow from the liberty enjoyed by the people, and the character and customs which naturally result from it. The conflict of parties is described, and the Revolution of 1688 is briefly noticed. If disputes be occasioned by a violation of the fundamental laws, and a foreign power appear, a revolution ensues which alters neither the constitution, nor the form of government. For a revolution formed by liberty becomes a confirmation of

[1] B. xix. c. 17. [2] C. 21. [3] B. xi. c. 6.

liberty. A free nation may have a deliverer: a nation enslaved can only have another oppressor; for whoever has power sufficient to dethrone an absolute sovereign has a power sufficient to enable him to become absolute himself. A people like this being always in a ferment, are more easily conducted by their passions than by reason, which never produces any great effects in the mind of men; it is, therefore, easy for those who govern to make them undertake enterprises contrary to their true interest.

The English nation is passionately fond of liberty, because this liberty is true and real; and it is possible for it, in its defence, to sacrifice its wealth, its ease, its interest, and to support the burthen of the most heavy taxes, even such as a despotic prince durst not bring on his subjects. Military men are thus regarded as belonging to a profession which may be useful, but is often dangerous, and as men whose services are burthensome to the nation. Civil qualifications, therefore, are more esteemed than military. The English nation, inhabiting a large island, and being in possession of a great trade, has grown extraordinarily powerful at sea. And as the preservation of its liberties requires that it should have neither strongholds, nor fortresses, nor land forces,[1] it has occasion for a formidable navy. This passage of Montesquieu may have suggested Campbell's noble lines:—

> "Britannia needs no bulwarks,
> No towers along the steep,
> Her march is on the mountain wave—
> Her home is on the deep."

The empire of the sea has always given those who have enjoyed it a natural pride: because, thinking themselves capable of extending their insults wherever they please, they imagine that their power is as boundless as the ocean. The English nation has a great influence on the affairs of its neighbours, for as its power is not employed in conquests, its friendship is more courted, and

[1] B. xix. c. 27.

its resentment more dreaded, than could naturally be expected from the inconstancy of its government and its domestic commotions. Thus it is the fate of the executive power in England to be almost always disturbed at home and respected abroad.[1]

Montesquieu observes, that should England become the centre of the negotiations of Europe, probity and good faith would be carried to a greater height than in other places; because the ministry being frequently obliged to justify their conduct before popular council, their negotiations could not be secret, and they would be found in this respect a little more honest. Besides, as they are in some sort accountable for the events which an irregular conduct would produce, the first and safest way for them is to take the straightest path.

The laws of commerce are discussed by Montesquieu in a wise and liberal spirit upon sound economical principles. Commerce is a cure for the most destructive prejudices; it refines and polishes the most barbarous manners. La Commerce guerit des prèjugés destructeurs, et c'est presque une regle generale que partout ou il y a des mœurs douces il y a du commerce, et que partout ou il y a du commerce il y a des mœurs douces.[2]

Peace is the natural result of trade. Two nations who traffic with each other become reciprocally dependent; for if one has an interest in buying, the other has an interest in selling; and thus their union is founded on their mutual necessities. L'Effet naturel du commerce est de porter a la paix. Deux nations qui negocient ensemble se rendent reciproquement dependantes; si l'une a interet d'acheter, l'autre a interêt de vendre; et toutes les unions sont fondies sur des besoins mutuel.[3]

Other nations have made the interests of commerce yield to those of politics; the English, on the contrary, have always made their political interests give way to those of commerce; and they know better than any other people upon earth how to value at the same time their three great advantages, religion, commerce, and liberty.[4]

[1] B. xix. c. 27. [2] B. xx. c. 1. [3] B. xx. c. 2, p. 349. [4] C. 6.

The principle of Free Trade is commercial. It is a true maxim that one nation should never exclude another from trading with it, except for the greatest reasons. The Japanese trade only with two nations, the Chinese and the Dutch. The Chinese gain a thousand per cent. upon sugars, and sometimes as much by the goods they take in exchange.[1] The Dutch make nearly the same profit. Every nation that acts upon Japanese principles must necessarily be deceived; for it is competition which sets a just value upon merchandise and establishes the relations between them.[2]

Commerce is sometimes destroyed by emperors, sometimes cramped by monarchs; it traverses the earth, flies from the place where it is oppressed, and stays where it has liberty.[3]

Montesquieu now proceeds to give an historical review of the commerce of the ancients—the Asiatics, the Greeks, the Romans—and the decline of commercial intercourse upon the fall of the Roman Empire.

Upon the philosophy of Aristotle being carried to the west, the schoolmen derived from it their doctrine as to lending upon interest; this they confounded with usury and condemned. Hence commerce, which was the profession only of mean persons, became that of knaves; for whenever a thing is forbidden, which nature permits or necessity requires, it is only making those who do it dishonest.

Commerce was transferred to a nation covered with infamy, and was soon ranked with the most shameful usury, and all the means of acquiring wealth were considered dishonest according to the estimate of the age. But the Jews, enriched by their exactions, were pillaged by the tyranny of princes. They invented bills of exchange that trade might elude violence. And the Theologians being afterwards obliged to limit their principles, commerce, which they had before connected by main force with knavery, re-entered the bosom of probity. Thus, to the speculations of the schoolmen are

[1] Du Halde, vol. ii. p. 70. [2] B. xx. c. 8. [3] B. xxi. c. 5.

due many of the misfortunes of commerce; and to the avarice of princes, the establishment of a practice which rendered it independent.[1]

The laws in relation to money,[2] marriage,[3] and religion,[4] are successively considered. The several religions of the world are examined only in relation to the good which they produce in human society. Toleration is inculcated.

The twenty-sixth book treats of laws as relative to the order of things on which they determine. In this some of the principles of general Jurisprudence are discussed; and Montesquieu thus classifies laws. Men are governed by the laws of nature; by the divine law; by the ecclesiastical or canon law; by the law of nations which may be considered as the civil law of the universe, in which sense every nation is a citizen; by the general political law, whose object is that human wisdom which has been the foundation of all societies; by the particular political law which relates to each society; by the law of conquest; by the civil law of every society by which a citizen may defend his possessions and his life against the attacks of any other; in fine, by domestic law, which proceeds from a society's being divided into several families, all of which have need of a particular government.[5] The distinctions between these laws, and the cases falling under each, are illustrated by numerous historical examples.

The next two books appear digressive from the main purport of the work. They are occupied with the origin and revolutions of the Roman laws or successions, and of the civil laws among the French. The trial by battle had some reason for it founded on experience. In a military nation, cowardice supposes other vices; it is as an argument of a person's having resisted the principles of his education, of his being insensible to honour, and of having refused to be directed by those maxims which govern other men; it shows that he neither fears their contempt nor sets any value upon their esteem. Men

[1] B. xxi. c. 13. [2] B. xxii. [3] B. xxiii. [4] B. xxiv. [5] B. xxvi. c. 1.

of any tolerable extraction in those days seldom wanted either the dexterity requisite to accompany strength, or the strength necessary to concur with courage; because as they valued honour they were practised in those things without which that honour could not be obtained. Besides, in a military nation, where strength, prowess, and courage are esteemed, crimes really odious are those which arise from imposture, finesse, and cunning, that is from cowardice. With regard to the trial by fire, after the party accused had put his hand on a hot iron or in boiling water, they wrapped the hand in a bag and sealed it up; if after three days there appeared no mark he was acquitted. But it is plain that amongst a people used to the handling of arms the impression made on a callous skin could not be so great as to be seen three days afterwards. And if there did appear any mark it showed that the person who had undergone the trial was effeminate. Montesquieu concludes, therefore, that under the circumstances of time in which the trials by battle and ordeal prevailed, there was such an agreement between these laws and the manners of the people, that the laws were not so productive of injustice as they were in themselves unjust.[1]

Hence arose the particular articles of the point of honour. The legal accuser began by declaring in the presence of the judge that such a person had committed such an action, and the accused made answer that he lied, upon which the judge gave orders for the duel. It became from this an established rule that whenever a person had the lie given him, it was incumbent on him to fight. All the rules and laws of the judicial combat are quoted from the old authorities.[2]

The twenty-ninth book, on the manner of composing laws, opens with a statement of the object of the work, namely, to show that the spirit of moderation ought to be the spirit of the legislator. For example, the set forms of justice are necessary to liberty; but the number of them might be so great as to be contrary to the end

[1] B. xxvi. c. 17. [2] B. xxviii. c. 20, *et seq.*

of the very laws which established them; then processes would have no end, property would be uncertain; the goods of one of the parties would be adjudged to the other without examining; or they would both be ruined by examining too much. The citizens would lose their liberty and security; the accusers would have no longer any means to convict, and the accused to justify themselves.[1] In this book many of the recognised rules of the mechanics of legislation are stated with sufficient accuracy.

The two last books are on the feudal laws among the Franks, in the relation they bore to the establishment and institutions of the monarchy. They form an able historical review of the feudal system in France down to the accession of the house of Capet. And, with a brief discussion on the perpetuity of the fiefs, the Spirit of Laws is somewhat abruptly terminated.

Montesquieu took for his motto—prolem sine matre creatam,—to signify that his great work was entirely original and that he owed no ideas to any former author. But every man is under the inevitable dominion of his antecedents. If he have energy and genius he suppresses them. Every great man is at once disciple and master. And Montesquieu, who thought he had no antecedents in his career, had nevertheless many, whose traces we find in his works—Bodin, Machiavelli, and Vico. Bodin in the sixteenth century laid the foundation of the philosophy of Right by his treatise De Republicâ. His learning, the many details collected by him on the aristocracy of Venice, his theory of climate, the general platform of the work, all have been useful to and used by Montesquieu. Machiavelli had already asked why we in modern times did not take lessons from the politics and history of the ancient world; why, when we studied their statues, their poems, and their tragedies, for sake of our progress in arts and letters, we did not also study their annals with a view to the study of political science. Montesquieu follows the Florentine in

[1] B. xxix. c 1.

these inquiries. The division of governments into three species—monarchical, aristocratical and popular, belongs amongst the moderns to Machiavelli. Bodin imitated it; and from the works of Machiavelli and Bodin it has passed into the Spirit of Laws. Montesquieu may have read the Scienza Nuova of Vico, who died in 1744, four years before the Spirit of Laws appeared. But if he did know the works of Vico, he only borrowed from the ingenious erudition of the Italian. Montesquieu never followed Vico's metaphysical system of Platonism.

3. It is not our purpose to dwell much upon the so-called negative philosophy of the eighteenth century. Never before had speculative opinions so asserted their right to intervene in politics. In France, towards the end of the eighteenth century, philosophy governed opinion and transformed society. When Montesquieu disappeared from the scene in 1755, the spirit of the negative philosophy was represented by Voltaire.[1] We now condemn Voltaire. We now condemn Rousseau. But it required strong thinkers, with little reverence for authority, with contempt for life and for the world's opinion, to denounce the abuses which preyed upon France before the first Revolution. The French society of the privileged classes was then as polished as the world has ever seen; but it had no sense of justice, toleration, or humanity for the French people. Voltaire has written almost nothing that belongs to positive science. His influence on society was entirely negative. He attempted to destroy abuses by pulling down bad institutions together with the good. But he did not even profess to rear any thing on the place of that which he attempted to destroy.

Rousseau[2] is perhaps the most singular example which

[1] Voltaire, b. 1694, d. 1788. Works: Philosophy of History, 1760: History of the Parliament of Paris, 1769: Essai sur les mœurs et l'esprit des nations, 1765. Works: Complete Edition; Lefevre and Deterville, Paris, 1817–20, 42 vols. 8vo.

[2] Rousseau, b. 1712, d. 1778. Works: Discourse on the causes of inequality among men, and the origin of societies, 1756: Le Contrât Social, 1762: Emile, 1762.

the world has ever seen of the power of genius to invest a bad man with celebrity. He was a wicked, worthless, and contemptible man. He led a selfish and abandoned life. Destitute of the common feelings of humanity, he sent his dear children to the foundling hospital. He cannot be said in private life ever to have done a good action. In public life he strove against the reforms which Voltaire attempted to accomplish. He was always engaged in quarrels with Diderot,[1] Hume,[2] and D'Alembert.[3] He believed that the world treated him with treachery and calumny, still his own confessions excite but contempt and disgust. Yet such is the power of genius, so great the clearness and the beauty of his style, so perfect his command of the French language, so unrivalled the development of which he has shown that language to be capable, that La Nouvelle Heloise and Le Contrat Social in all probability will be read and admired so long as the French language is spoken. The little town of Geneva has had the wonderful fortune of having been governed by Calvin and of having produced Rousseau. Rousseau has immortalized the beautiful scenes of his native country; and the villages of Clarens, Montreux, and Melleray, are better known than many historical cities.

The principal political writings of Rousseau are the Discourse on the Inequality of Conditions and the Social Contract. But there is a great difference between the two works. In the first Rousseau tries to discover the natural and primitive man, such as he must have been, before being denaturalized by civilization. But in depriving man of all which characterizes him now in the social state, Rousseau ends by seeing in him only an animal, less strong than some, less active than others, but on the whole organized the most advantageously of all. He describes with spirit this state of nature which

[1] Diderot, b. 1712, d. 1784. Encyclopedia, 1751–1767: Complete Edition of Works, 15 vols. 8vo. Paris, 1793.

[2] Hume, b. 1711, d. 1776. Treatise on Human Nature, 1738: Political Discourses, Edinburgh, 1752: History of England, 1754–1761.

[3] D'Alembert, b. 1717, d. 1783. Works: Complete Edition; Bastieu, Paris, 1805, 18 vols. 8vo.

his imagination supposes. He attributes to man a great physical force to triumph over the obstacles of nature; an extraordinary agility to resist ferocious animals; a natural indifference to good or evil; an equal absence of goodness as of wickedness. In this imaginary primitive state there are few inequalities. Inequality is the work of civilization—the effect of the passage from the natural state to the social state. But there is really no use in following Rousseau through the endless contradictions of his theory. According to him speech is not natural; yet man speaks. The state of the family is not natural; yet man lives in the state of the family. Society is not natural; yet man lives in a state of society. The doctrine of the Social Contract is equally untenable. This theory implies that wild and wandering savages met together, and by contract established the first government; and that hence is the authority of the government over the people. But there is no historical trace of such a transaction ever having occurred; and even if it did occur, there is no reason why succeeding generations should be bound by it.

It is difficult for us now reading the works of Voltaire and Rousseau, to imagine the influence which they had in producing the French Revolution. Yet all succeeding French writers have attributed to them the most wonderful importance. Janet, the latest writer on political philosophy in France, says, that from 1764 to 1789 the Social Contract of Rousseau every day extended its authority, and that it may be said without exaggeration to have produced the Revolution. The decisive proofs are the irrevocable acts of the French Revolution, the oath of the Tennis Court, the night of the 4th of August, and the Declaration of Rights.

The spirit of Montesquieu, Rousseau, Diderot, and Voltaire was in the charter of the rights of man which Lafayette bore to the tribune of the Constituent Assembly.

"Les représentants du peuple français, constitués en assemblée nationale, considérant que l'ignorance, l'oubli ou le mépris des droits de l'homme sont les seules causes des

malheurs publics et de la corruption des gouvernements, ont résolu d'exposer dans une déclaration solennelle les droits naturels, inaliénables et sacrés de l'homme, afin que cette déclaration, constamment présente à tous les membres du corps social, leur rappelle sans cesse leurs droits et leurs devoirs; afin que les actes du pouvoir législatif et ceux du pouvoir exécutif, pouvant être à chaque instant comparés avec le but de toute institution politique, en soint plus respectés; afin que les réclamations des citoyens, fondées désormais sur des principes simples et incontestables, tournent toujours au maintien de la constitution et au bonheur de tous. En conséquence, l'Assemblée nationale reconnaît et déclare, en présence et sous les auspices de l'Etre suprême, les droits suivants de l'homme et du citoyen: Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune. Le but de toute association est la conservation des droits naturels et imprescriptibles de l'homme: ces droits sont la liberté, la sûreté, la propriété, et la résistance à l'oppression. Le principe de toute souveraineté, réside essentiellement dans la nation; nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément. La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui; ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi. La loi n'a le droit de défendre que les actions nuisibles à la société. Tout ce qui n'est pas défendu par la loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas. La loi est l'expression de la volonté générale. Tous les citoyens ont droit de concourir personnellement ou par leurs représentants à sa formation; elle doit être la même pour tous, soit qu'elle protége, soit qu'elle punisse. Tous les citoyens, étant égaux à ses yeux, sont également admissibles à toutes les dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de

leurs vertus et de leurs talents. Nul homme ne peut être accusé, ni détenu, que dans les cas déterminés par la loi, et selon les formes qu'elle a prescrites. Ceux qui sollicitent, expédient, exécutent ou font exécuter des ordres arbitraires doivent être punis; mais tout citoyen appelé ou saisi en vertu de la loi doit obéir à l'instant; il se rend coupable par la résistance. La loi ne doit établir que des peines strictement, évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée. Tout homme étant présumé innocent jusqu' à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi. Nul ne doit être inquiété pour ses opinions, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi. La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la loi. La garantie des droits de l'homme et du citoyen nécessite une force publique; cette force est donc instituée pour l'avantage de tous, et non pour l'utilité particulière de ceux auxquels elle est confiée. Pour l'entretien de la force publique et pour les dépenses d'administration, une contribution commune est indispensable; elle doit être également répartie entre tous les citoyens en raison ne leurs facultés. Tous les citoyens ont le droit de constater par eux-mêmes ou par leurs représentants la nécessité de la contribution publique, de la consentir librement, d'en suivre l'emploi et d'en déterminer la quotité, l'assiette, le recouvrement et la durée. La société a le droit de demander compte à tout agent public de son administration. Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution. La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique légalement constatée l'exige évidem-

ment, et sous la condition d'une juste et préalable indemnite."[1]

[1] "When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this let facts be submitted to a candid world. He has refused his assent to laws the most wholesome and necessary for the public good. He has forbidden his Governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them. He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the Legislature—a right inestimable to them, and formidable to tyrants only. He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures. He has dissolved Representative Houses repeatedly for opposing with manly firmness his invasions on the rights of the people. He has refused for a long time after such dissolutions to cause others to be elected, whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise, the State remaining in the meantime exposed to all the dangers of invasion from without and convulsions within. He has endeavoured to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners, refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands. He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers. He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries. He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance. He has kept among us in times of peace standing armies without the consent of our legislatures. He has affected to render the mili-

tary independent of and superior to the civil power. He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation. For quartering large bodies of armed troops among us; for protecting them by a mock trial from punishment for any murders which they should commit on the inhabitants of these States; for cutting off our trade with all parts of the world; for imposing taxes on us without our consent; for depriving us in many cases of the benefit of trial by jury; for transporting us beyond seas to be tried for pretended offences; for abolishing the free system of English laws in a neighbouring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies; for taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our government; for suspending our own legislatures and declaring themselves invested with power to legislate for us in all cases whatsoever. He has abdicated government here by declaring us out of his protection, and waging war against us. He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people. He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation. He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands. He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions. In every stage of these oppressions we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant is unfit to be the ruler of a free people. Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations which would inevitably interrupt our connexions and correspondence. They too have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them as we hold the rest of mankind—enemies in war, in peace friends. We, therefore, the Representatives of the United States of America in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connexion between them and the State of Great Britain is and ought to be totally dissolved; and that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honour."—*The Unanimous Declaration of the Thirteen United States of America.* 1776.

CHAPTER III.

THE GERMAN SCHOOL OF JURISPRUDENCE IN THE EIGHTEENTH CENTURY.

1. From the time of Puffendorf the terms Law of Nature and Law of Nations were almost synonymous in Germany. Samuel Rachel[1] was originally a professor, and afterwards was ambassador of Holstein at the Congress of Nimeguen. He recognised the reality of a law, which, being established among nations, through consensions, express or tacit, binds them to each other for their mutual advantage. Rachel, in 1678, published a treatise, De Jure Naturæ et Gentium Dissertationes duæ. This contained an outline of the Law of Nature and of the Law of Nations. With reference to the last, and in opposition to Puffendorf, he accurately defines the two sciences. He correctly traces the natural law of nations as applicable to different stages of civilization, and defines the conventional law of nations under the term jus pactitium.

Different other learned men in Germany had exerted themselves to controvert and refute the opinion of Puffendorf as to the non-existence of a law of nations distinct from the law of nature, and had ascribed to it the character of a science. The exertions, however, of Thomasius,[2] his learning, and his reputation, rendered the opinions of Puffendorf which he adopted, for a time triumphant. And the Germans continued to write only on the natural law of nations, leaving the cultivation of the positive law of nations to a more recent period.

Up to this time, Germany wanted the last seal of civilization—a national literature. Leibnitz, a genius rather

[1] B. 1628, d. 1691.

[2] Christian Thomasius, b. 1655, d. 1728. Works: C. Thomasii Institutionum Jurisprudentiæ Divinæ, libri iii., in quibus Fundamenta Juris, Nat. sec. hypotheses Puffendorfii perspicue demonstrantur. Franc. et Lips. 1688, 4to; Halle, 1717 and 1712, 4to. Fundamenta Juris Naturæ et Gentium, ex sensu communi deducta. Halle, 1705-1718, 4to.

European than German, had troubled himself little about using the language of his native country. He wrote in Latin and in French. At the close of the seventeenth and beginning of the eighteenth centuries, no German writer could be popular in Europe.

Thomasius, on his appointment to a professorship at Leipsic, introduced the great and popular innovation of teaching in the German language. He thus brought the national idiom into the Universities. Banished by the authorities from Leipsic, he founded the University of Halle. His numerous works on Jurisprudence, Theology, and Philosophy, in their day, agitated his cotemporaries. But their useful mediocrity has not saved them from oblivion. Nevertheless, in the history of the Science, his early correctness takes a place. In the first part of his career he adopted the principle of sociability established by Grotius, and followed by Puffendorf. Later he applied to natural law his principle of morality —reasonable self-love.

Buhle, in his History of Philosophy, sketches the doctrine of Thomasius touching the natural law. All law is of two species. It rests either on positive laws and conventions with others, or on the proper subjective nature of man. Law comprises only an exterior relation. Obligation may have an interior relation, but this relation is determined by the rules of morality and not by those of law. To obey the interior obligation renders man virtuous. To obey the exterior obligation renders him just. The true principle of natural law is the greatest and most lasting happiness of human life.

Thomasius appears to have marked the distinction between Law and Ethics, and to have limited the Jus Naturæ to those negative principles which influence our external conduct, and to those duties which are capable of being enforced. He also insisted upon the intrinsic rectitude and wickedness of actions as being the first and sole principle of Natural Law. His cotemporaries and successors, Gerhard, Gundling, and Achenwall, extended and improved his system.

Gerhard and Gundling[1] clearly pointed out the distinction between Law and Ethics. From their writings may be collected the correct definition of natural law as the theory of that part of our duties capable of being enforced.

Thomasius was the pupil of Puffendorf; Gundling was the pupil of Thomasius. Gundling was successful in life, having early obtained a good professorship at Halle, and having been a privy councillor of Prussia. He has left a great number of important writings. The study of public law in Germany had begun to make considerable progress from the time of Leibnitz. Gundling has certainly the merit of first distinguishing the element of coercion in law from morality. The principle of compulsion distinguishes law and justice from every other faculty and virtue. Law, properly so called, is a rule, the violation of which is visited with external suffering. Right is liberty authorized by law. Natural law rests upon the necessity of preserving external peace in the bosom of society. This preservation can only result from the exercise of the public power. Gundling, although he has left no work as a model to follow, still must be considered as one of those who have exercised a great influence on the studies of his age.

Achenwall[2] has been commonly regarded as the inventor of the Science of Statistics. He published many works on history, on public law, and political economy. They ran through numerous editions. In his historical works and courses he applied himself principally to seize, in the midst of events which the annals of every nation afford, all that contributed to the formation and development of their political existence. His principal

[1] Ephraim Gerhard, b. 1682, d. 1718. Delineatio Juris Naturalis sive de principiis Justi libri tres, quibus fundamenta generalia doctrinæ de decoro accesserunt: Jena, 1742, 8vo. Nicholas Jerome Gundling, b. 1671, d. 1729, Professor at Halle: Jus Naturæ et Gentium: Halle, 1814, 8vo; Frankfort and Leipsic, 1734, 4to. Via ad veritatem juris naturæ, 1715; Historia Philosophiæ Moralis, 1706.

[2] Gottfried Achenwall, b. 1719, d. 1772. Jus Naturæ: Gottingen, 1750; 7th ed., 1781, 2 vols. 8vo; Observationes Juris Naturæ et Gentium: Gottingen, 1750, 4to.; Prolegomena Juris Naturæ: Gottingen, 1748; 5th ed. 1781.

merit is that he submitted to a precise and constant form the nature of the living forces of the state. Achenwall gave to his new science the name of the Science of the State — *Scientia Statistica*. And from this the word *statistics*, in various forms, has become familiar to every language in Europe.

Christian Wolf[1] was born at Breslau in Silesia, in 1679. He was distinguished in mathematical studies at the University of Jena; and afterwards taught at Leipsic. On the recommendation of Leibnitz he was named professor at Halle. For nearly fifty years he lectured at Halle and Marburg, only interrupted by some political troubles. He died in 1754, at the age of seventy-six. Wolf was the first who, in modern times, sketched out a complete encyclopædia of the sciences. He wrote much in the German language. He popularized the philosophy of Leibnitz; and was the main support of the Leibnitzian School, which lasted until 1781, when it began to be overthrown by the system of Kant. Stewart describes him as "a man of little genius, originality, or taste, but whose extensive and various learning, seconded by a methodical head and by incredible industry and perseverance, seems to have been peculiarly fitted to command the admiration of his countrymen." Wolf entirely followed Leibnitz. He reprinted the treatise of Leibnitz, entitled the New Method of Teaching and Learning Jurisprudence; and himself wrote many treatises on Method. The writers of the School of Puffendorf had treated the science of International Law as a branch of the science of Ethics. They had considered it as the natural law of individuals applied to regulate the conduct of the independent societies of men, called states. To Wolf belongs the credit of applying the principle of the division of labour more completely to International Law. He separated the Law of Nations completely from that part of Natural Jurisprudence

[1] Christian Wolf, b. 1679, d. 1754. Works: Philosophia Moralis sive Ethica: Halle, 1750, 4 vols. 4to. Philosophia Civilis sive Politica: Halle, 1746, 4 vols. 4to; Jus Gentium, Halle, 1750, 4to; Jus Naturæ methodo scientificâ pertractatum in decem tomos distributum: Halle, 1740–1747.

which treats of the duties of individuals. But he confounded natural law with the moral law; and established it on this principle—man should always do that which maintains or increases the perfection of his own being and that of others, and should abstain from that which renders his state or that of others more imperfect.

In 1749 he published an abridgment of his great work, under the title—Jus Gentium methodo scientifico pertratactum, in quo jus gentium naturale ab eo quod voluntarii pactitii et consuetudinarii est, accurate distinguitur. Wolf says, in the preface, that since such is the condition of mankind, that the strict law of nature cannot always be applied to the government of a particular community but it becomes necessary to resort to laws of positive institutions more or less varying from the natural law, so in the great society of nations it becomes necessary to establish a law of positive institution more or less varying from the natural law of nations. As the common welfare of nations requires this mutation, they are not less bound to submit to the law which flows from it, than they are bound to submit to the natural law itself; and the new law thus introduced, so far as it does not conflict with the natural law, ought to be considered as the common law of all nations. This law, Wolf, following Grotius, terms the voluntary law of nations—Quoniam vero hanc ipsam immutationem ipsa gentium communis salus exigit, ideo quod inde prodit jus, non minus gentes inter se admittere tenentur quam ad juris naturalis observantiam naturaliter obligantur et non minus istud quam hoc salva juris consonantia pro jure omnium gentium communi habendum. Hoc ipsum autem jus cum Grotio, quamvis significatu prorsus eodem, sed paulo strictiori jus gentium voluntarium appellare libuit.[1] Wolf afterwards says that the voluntary law of nations derives its force from the presumed consent of nations, the conventional law of nations from their express consent, and the customary law of nations from their tacit consent. Wolf derives this presumed

[1] Wolf, Jus Gentium: Proleg. sec. 3.

consent of nations—consentium gentium præsumptum —from the fiction of a great commonwealth of nations —civitate gentium maximâ—instituted by nature herself, and of which all the nations of the world are members. As each society is governed by the peculiar laws adopted by itself, so the general society of nations is governed by its appropriate laws, freely adopted by the general members on their entering the same. These laws are deduced by Wolf from a modification of the natural law, so as to adapt it to the peculiar nature of that social union, which makes it the duty of all nations to submit to the rules by which that union is governed, in the same manner as individuals are bound to submit to the laws of their own state.

Wolf considers that he differs from Grotius as to the origin of the voluntary law of nations in two particulars: —First, that Grotius considered it as a law of positive institution, and rested its obligation upon the general consent of nations as evidenced in their practice. On the other hand, Wolf considered it as a law which nature imposes on all mankind as a necessary consequence of their social union, and to which no one nation is at liberty to refuse its consent:—Secondly, that Grotius confounds the voluntary law of nations with the customary law of nations, from which it differs in this respect, that the voluntary law of nations is of universal obligation, whilst the customary law of nations merely prevails between particular nations, among whom it has been established from long usage and tacit consent.

Wolf considered that in the idea of perfection he had discovered the fundamental principle from which the whole system of practice might be deduced. He defined those actions to be good which perfect our condition. The grand rule of virtue is "perfice te ipsum." This is a law of our spiritual nature. In the province of Jurisprudence this law takes the form of compulsion: in Morality it takes that of duty. The consciousness of our perfection bestows content: a state of content con-

fers happiness. The consciousness of continued progress is the highest good of man.

The class of moralists and jurists who hoped to discover and unfold, *à priori*, complete systems of ethics and law, almost terminated with Wolf. This expectation they never could realize. Useful generalization is limited by the extent of the field actually observed. The jurists of the seventeenth and eighteenth centuries had only the Roman Law to study; and, accordingly, the Law of Nature, as unfolded by Puffendorf, Cocceii, and Wolf, is nothing but a series of propositions taken from the Civil Law of the Romans, stripped of the characteristics of the Roman system. Wolf, also, was one of the last who wrote in Latin. Thomasius and Wolf had for their cotemporaries men who continued the exclusive use of the Latin language; but a new era was dawning for Germany. Klopstock wrote the national hymns. Kant, a worthy successor of Des Cartes, created the metaphysical language of Germany.

The school of Wolf can boast of the names of Heineccius, Ickstedt, Nettelbladt, Baumgarten, and Bach;[1] but their works are, like those of their master, merely digests of the Roman law, stripped of its details.

Kant[2] was born at Konigsberg in 1724; became a professor there, and died in 1804. Tennemann has styled Kant a second Socrates, as having created a new philosophy, which, by investigating the origin and limits of human knowledge, revived the spirit of research, extended it, taught it its present position, and directed it

[1] John G. Heineccius, born 1680, died 1741, Professor at Halle: Elementa Juris Civilis secundum ordinem Institutionum et Pandectarum. Works, 8 vols. 4to. Geneva, 1744. J. A. F. Von Ickstedt, born 1702, died 1776: Elementa Juris Gentium, 1740, 4to. Opuscula juridica, Ingolstadt et Aug. Vindel, 1747, 2 vols. 4to. Dan. Nettelbladt, born 1719, died 1791: Systema elementare Universæ Jurisprudentiæ Naturalis usui Jurisprudentiæ positivæ accommodatum, Halle, 1749, 5th edition, 1785. Alexander Gottlieb Baumgarten, born 1714, died 1782: Jus Naturæ, Halle, 1765, 8vo. Bach, born 1721, died 1758, Professor at Leipsic: Historia Jurisprudentiæ Romanæ, 1754, 8vo. Opuscula ad historiam et jurisprudentiam spectantia, Klotz, Halle, 1767.

[2] Immanuel Kant (1724–1804): Metaphysische Anfangsgründe der Rechtslehre, 1798. Tennemann's History of Philosophy.

to the true path of science, through the cultivation of Self-Knowledge. Kant laid down that Philosophy and mathematics are in their origin, rational, or intuitive sciences. Rational cognitions are distinguished from Empirical by the qualities of necessity and universality. Virtue consists in obedience to the dictation of duty, or the moral constraint imposed by the legislative power of Reason. Civil or juridical law is distinguished from moral, inasmuch as the former legislates only with respect to external actions, and provides for the freedom of all, by limiting and defining that of individuals. The description of Right which results is of a coercive character and demands the protection of the State: which is itself a legal institution, based upon contracts.

In 1781, the entire scheme of German Philosophy was changed by the publication of the Critique of Pure Reason. I shall not occupy these pages with any discussion of the Kantian scheme of philosophy. Some of Kant's legal definitions are, however, useful to consider in a history of legal science. Kant professes to find a real objective law, which he formalizes thus:—"*Act so that the maxims of the will may also have the force of a principle of general legislation.*" He distinguishes law from morality through the possibility of external legislation. He assumes as a postulate a legal or juridical state or condition as necessary for all peremptory legality, in opposition to a merely provisional state. He divides Law into public and private, and defines Private Law as the doctrine of mine and thine external. All legislation contains two elements:—I. A law which presents objectively as necessary the thing which ought to be done. II. A motive,—triebfeder, which joins subjectively to the idea of the law a principle capable of determining the will to the action. The first presents the action as a duty; the second joins to the obligation of acting a principle capable of determining the will in general. Every thing which presents the action as a duty to be performed is a motive coming under the denomination of Ethics. Every thing, on the other hand, which does not comprise

the last condition in the law, and which in consequence includes another motive than the idea of duty is juridical. In order that an action should be legal it suffices that it be conformable to the law, whatever be the motive; but in order to be a moral action it must be influenced by the idea of duty.[1] Legality is the conformity of an action with the law of duty; morality is the conformity of the motive of the action with the same law. The problem to be solved in the science of law is to discover the universal criterion by which we can distinguish the just from the unjust. If we consider the conception of Law in its relation with a corresponding obligation, we shall perceive that it is applied only to the exterior and practical relations of one person with another, so far only as their actions can, immediately or mediately, have as facts influence one on the other. Law (jus) is the whole of the conditions by means of which the will of one person may be in harmony with that of another, following a general law of liberty.[2] The universal law of right is, "Act exteriorly in such a way that the free exercise of your will may harmonize with the liberty of all." All law, in the strict sense, implies the faculty of constraint. Strict law may be represented as the possibility of a general and reciprocal restraint, harmonizing according to universal laws with the liberty of all.[3] Law implies the faculty of constraint; but we may still conceive Law in a wider sense, in which the faculty of constraint cannot be determined by any general principles.

This law is divided into Equity and the Law of Necessity. The pretended Law of Necessity is, *e.g.*, in the case where a person's life would be endangered, that he would have a right to take away the life of the aggressor. But the action which consists in applying violence to preserve oneself, escapes punishment only because it is not culpable; and it has been by a strange confusion that jurists take this subjective impunity for an objective impunity. "Necessity has no law" is the maxim; but no necessity can render lawful that which is in itself unjust. Kant

[1] Introduction, sec. 3. [2] Ibid. sec. B. [3] Ibid. sec. E.

adopts the general division of the duties of Law according to Ulpian:—I. Honeste vive. II. Neminem læde. III. Suum cuique tribue. Law, so far as it is formed into a systematic science, is divided into—I. Natural Law, which rests solely on principles *à priori*. II. Positive Law, which emanates from the will of a legislator.

Law considered as a moral faculty of obliging others is divided into Innate and Acquired. The first is that law which each person has in himself from nature; the second is that which supposes an act of that species. This original Law is Liberty; independence of every constraint imposed by the will of another so far as it can harmonize following a general law with the liberty of all. Natural Equality is that independence which prevents our being obliged by others to do any thing more than we can oblige them to do in turn.

All duties are—Duties of Law, *i.e.*, duties susceptible of exterior legislation; or, Duties of Virtue, *i.e*, duties which do not import compulsory legislation.[1] The first great division of Law is into Public and Private. Private Law is the theory of meum and tuum external. Kant states[2] there are three species of objects external to the will of an individual:—I. A corporeal thing external to the individual. II. The will of another relatively to a determined fact. III. The state of another in relation to the individual. These represent categories of—I. Substance. II. Causality. III. Reciprocity between external objects and the individual. It is not possible for an individual to possess any thing exterior as his, except in a juridical state, under a public legislative power. There may nevertheless be in a state of nature a meum and tuum external, but only provisionary.[3] The general principle of external acquisition is this: A thing external is originally mine, when it is mine even without any juridical act. An original acquisition is that which is not derived from what another has already made his own. Nothing exterior is originally mine. The state of a community of meum and tuum can never be conceived as original;

[1] End of Introduction. [2] Chap. i. sec. 4. [3] Chap. i. sec. 89.

but it must be acquired by means of an exterior juridical act. The circumstances of original acquisition are three:—I. The taking of an object which does not belong to any one; without which this acquisition would be contrary to the liberty of others, so far as it is regulated by general laws. This taking is the assuming of possession in space and time of an object of the will. II. The declaration of the possession of this object and of the act of the will by which I forbid the use of it to every other person. III. The appropriation emanating in idea from the will. The original acquisition of an external object is called occupation, and can only take place in corporeal things. Priority of time is essential to occupation, on the maxim "Qui prior est tempore potior est jure."

The division of the acquisition of meum and tuum external is threefold:—I. Considering the matter of the object, a corporeal thing is acquired; or certain rights with regard to disposing of the state or capacity of a person. II. With regard to the mode of acquisition the right is real (jus reale) or personal (jus personale) or a right partly real and partly personal (jus realiter-personale). III. Considering the title of acquisition, an external thing is acquired by the act of the will of one, or of the will of two, or of the will of all (facto, pacto, lege).[1]

The exposition of the conception of the original acquisition of the soil is as follows:—All men are originally in common possession of all the soil of the earth, and they have each naturally the desire to use it; but by reason of the natural opposition which inevitably takes place between the free will of one and that of another all use of it would become impossible, if there were not adopted a law to regulate this liberty, according to which each person could have on the common soil a particular determinate possession. But the distributive law of the meum and tuum on the soil could only emanate from the collective will, and by consequence is possible only in a civil state; for this will alone determines what is just, what is legal, and what is the law.[2] The title of

[1] Sec. 10. [2] Page 98.

acquisition was found in the original community of the soil and in the external possession. The mode of acquisition was found in the empirical conditions of the taking of possession, joined to the will of making the external object one's own.[1]

The possession of the will of another person, as a faculty of determining it by my own will to a certain action compatible with the laws of liberty, is a right; and the whole of the laws according to which that possession may be enjoyed is Personal Law. The acquisition of a personal right cannot be arbitrary; for such an acquisition would not be conformable to the principle of harmony of my will with that of another, and consequently would be unjust. It cannot be acquired by the unjust action of another, for when an injury would have been committed towards me, and when I would have the right to exact satisfaction for it, all that I could legally do would be to maintain intact all that which belongs to me; but I could acquire nothing more than what I already had. The acquisition which takes place by the act of another is always derived from what belongs to the other, and this derivation as a juridical act cannot take place by a negative act, such as the abandonment or renunciation of his own; for by an act of that kind what belongs to a person ceases to be his own, but is not for that reason acquired by another. It can only take place by transfer, which is possible only by means of a common will. Transfer of property to another is alienation. The act of the collective will of two persons, by which, in general, what belongs to one passes to the other, is contract. In every contract there are two juridical acts preparatory, and two constitutive. The two first compose the action of the treaty; they are the offer and the consent. The two other, which form the conclusion of the affair, are the promise and the acceptance. Kant next treats of the passage of meum and tuum external in a state of nature, to meum and tuum in the juridical state in general. The juridical state is that

[1] Sec. 17.

relation of men mutually, in which exist the conditions which alone permit each person to participate in his right. The formal principle of the possibility of this state, considered in the point of view of the idea of a general legislative will, is called public justice, which, considered under the relation whether of possibility, whether of reality, whether of the necessity of the legal possession of objects, may be divided into—I. Protective Justice (justitia tutatrix). II. Commutative Justice (justitia commutativa). III. Distributive Justice (justitia distributrix). In the first, the law expresses only the conduct which is interiorly just as regards form. In the second, it designs that which, as matter, is still exteriorly susceptible of falling under the law. In the third, it indicates that which, or that relatively to which, the sentence given by a tribunal is in a particular case submitted to a given law, conformable to that law. The state which is not juridical, *i.e.*, in which there is no distributive justice, is called the state of nature (status naturalis). That which is opposed to it, and which may be called an artificial state, is not the social state, but the civil state, or the state of a society submitted to a distributive justice.[1]

Part II. of the Treatise on Law is on Public Law. Public Law is the whole of the laws which require to be promulgated, in order to produce a state. It is, therefore, a system of laws for a people, that is to say, a certain quantity of men, who, being mutually in a relation of reciprocal influence, require, in order to enjoy their rights, a juridical state to reunite them under one will, *i.e.*, a Constitution. This state of mutual relation between individuals united into a people, is called the civil state (status civilis); and the whole, by relation to its parts, is called the state (civitas). Thus, having for a common tie the interest which all have received from its very form, its name is the public thing (respublica). In relation to other people, it is called simply power (potentia): whence comes the word potentates; and by

[1] Page 158.

reason of the hereditary union which constitutes it, it is called nation (gens). Thus, under the general conception Public Law, it is necessary to comprehend not only Political Law, but also the Law of Nations; and these two species of law together necessarily conduct to the idea of a Political Law of Nations, or Cosmopolitical Law. A state is the union of a certain number of men under juridical laws. So far as these laws, considered in the relation of laws *à priori*, are necessary, *i.e.*, naturally flow from the conceptions of external law in general, its form is that of a state in general, or an ideal state, such as it ought to be.

Of right,[1] every state encloses within itself three powers —I. Executive. II. Judicial. III. Legislative. The legislative power ought only to belong to the collective will of the people. A law springing from such a source, in strictness cannot do injustice to any one—"Volenti non fit injuria." The members of such a society (societatis civilis) are called citizens, and their juridical attributes as citizens are three:—I. Legal Liberty, *i.e.*, the power of not obeying any law except that to which the citizens have consented. II. Civil Equality, which consists in not acknowledging in the people any other superior in power except those who have the right of imposing a legal obligation. III. Civil Independence, which consists in owing existence and preservation only to one's own rights and strength as a member of the state, and not to the will of another.[2] These three powers in the state are political dignities. They are all co-ordinate, and each is the necessary complement of the two others; they are also mutually subordinate, so that no one ought to usurp the function of the other; they also mutually unite for the purpose of giving to each citizen that which is his due. The second division of Public Law is the Law of Nations. The elements of the Law of Nations are as follows:—I. States considered in their reciprocal exterior relations are naturally in a state not juridical, like, *e.g.*, savages without laws. II. This state is a state of war,

[1] Sec. 45. [2] Sec. 46.

although it does not imply any open or permanent hostility, but that whatever right exists is the right of the strongest. III. It is necessary to found according to the idea of an original social contract and alliance of nations, by which they engage not to interfere in intestine discords; but to protect themselves mutually against attacks from without. This alliance does not suppose a sovereign power, as in the case of civil constitution; but only a confederation which requires to be renewed from time to time by treaties.[1] The third division of Public Law is Cosmopolitical Law. The rational idea of a perpetual association, if not amicable, at least pacific, amongst all the nations of the earth, between which there may be effectual relations, is not merely a philanthropical idea, but is a legal principle. Nature has enclosed all men within determined limits, and as the possession of the soil in which each person lives can only be considered as the possession of a part of a determined whole, all nations are originally in community of the soil, not in legal community of possession, but in community of commerce. This law, so far as it relates to the possible associations of all nations, with regard to certain universal laws presiding over the relations which may be established between them, may properly be called Cosmopolitical Law[2] (jus cosmopoliticum).

In 1795 Kant wrote the "Essay on Perpetual Peace." It contains the preliminary articles to a perpetual peace between nations:—I. No treaty of peace ought to be considered as such, if there be reserved secretly in it any topic for recommencing war. Such a treaty would be in effect only a simple armistice, a suspension of arms, and not peace, which signifies the end of all hostilities. II. It should not be possible for one state to acquire another independent state, whether by inheritance, exchange, purchase, or gift. A state in effect is not, like the soil on which it resides, a property. It is a society of men which no one ought to command, and which no one ought to dispose of except itself. III. Standing armies (miles perpetuus) ought to disappear entirely with

[1] Sec. 54. [2] Page 231, sec. 62.

time ; for these appearing always ready for the combat, incessantly threaten other powers with war, and excite states to surpass one another in the quantity of their troops. This rivalry, which knows no bounds, is a source of expense which ends by rendering peace more burdensome than a short war. IV. National debts ought not to be contracted for the purpose of interests external to the state. This system of credit in which debts indefinitely increase, without there ever being any actual reimbursement, is, considered as a means of action of one state on another, a dangerous pecuniary power—it is in effect a treasure always ready for war. This facility of making war, joined to the desire which drives sovereigns to it, and which seems inherent in human nature, is a great obstacle to perpetual peace. Hence it is more urgent to make as a preliminary article of the treaty of perpetual peace, the abolition of this obstacle, which sooner or later must result in national bankruptcy. V. No state ought to employ force by way of interference with the constitution or government of another state. VI. No state should permit itself to use in a war with another state hostilities which would render impossible reciprocal confidence on the return of peace, *e.g.*, the employment of assassins, or poisoners; the violation of a capitulation; exciting to treason. These are disgraceful stratagems. There must be still in the midst of war some confidence in the sentiments of the enemy; otherwise no treaty of peace would be possible, and hostilities would degenerate into a war of extermination (bellum internecinum). But war is the sorrowful means to which we are condemned to have recourse in order to support right by force, since there is no tribunal established which can judge juridically.

The second section contains the articles of a treaty of peace between nations. The state of peace among men living together is not a state of nature (status naturalis), which is rather a state of war, if not always declared, at least always threatening. The state of peace requires therefore to be established by laws. Every juridical constitution, so far as it touches the persons

submitted to it, is founded—I. On the Civil Right of men forming a people. II. On the Law of Nations, which regulates the relations of states between themselves. III. On the Cosmopolitical Law, so far as we consider men and states in their exterior relations and in their reciprocal influence as citizens of one universal state of humanity. The first definitive article of a treaty of universal peace is "the civil constitution of each state should be free." A free constitution is founded on the principle of the liberty of the members of a society as men, on the submission of all, as subject to a single and common legislation, and on the law of the equality of all the subjects as citizens. Kant terms this free constitution "republican," in the sense derived from the Latin (respublica), but not in a democratic sense.

In such a constitution, since the question of knowing whether war would take place or not could be decided only by the suffrage of the citizens, there would be nothing more natural than that having to decree against themselves all the calamities of war, they would hesitate much to engage in so perilous a game. But in a constitution in which the subjects are not citizens, and which by consequence is not republican, a declaration of war is the easiest thing in the world; for the sovereign being the proprietor, and not a member of the state, has little to fear for his personal comfort, and may decide on war for the most frivolous reasons. A republican government is not to be confounded with democracy. And the forms of the state may be divided either according to the persons who enjoy the sovereign power, or according to the manner in which the people is governed by its sovereign. The first is properly the form of sovereignty, of which there are three—autocracy, aristocracy, and democracy, depending upon whether one or more than one or all possess the sovereign power. The second is the form of government. It concerns the mode, founded on the constitution, following which the state makes use of its sovereign power, and it is either Republican or Despotic. Republicanism is the political principle of the separation of the executive power and of the

legislative power. Despotism is the government where the chief of the state executes arbitrarily his own laws, and where in consequence he substitutes his own for the public will. The second definitive article of a treaty of perpetual peace is, "The Law of Nations should be founded on a federation of free states." The third definitive article of a treaty of perpetual peace is, "The Cosmopolitical Law should extend to universal hospitality." The word "hospitality" in this sense is the right which every stranger should have to be received as a friend in every country in the world.

2. It is not necessary to discuss at any length the opinions of Fichte, Schelling, Hegel, or others of the modern German school. The doctrine of Law has for its first principle that each free being should limit his own liberty by an acknowledgment of the liberty of other persons. From man the philosopher passes to the state. Political law proposes to itself nothing else than to find a will, in which the individual will and the general will are synthetically united. Thus Fichte,[1] in sharing the profound sentiment of individuality, touched on the same political results as Rousseau, whose genius and maxims exercised over him an incontestible influence. But from the time that Fichte makes man enter into society, one principle only is recognised—individual liberty; there is but one precept and one duty to maintain, defend, and aggrandize it. In the state, such as Fichte conceived it, the executive power is omnipotent. Fichte was much struck by the French Revolution. He loved it, defended it, and explained it to his countrymen. He of himself appreciated philosophical liberty. Fichte conducted German thought to the most subtle point of idealism.

Schelling[2] commenced by being the adherent of Fichte; but he soon felt the want of more enlarged views. He was stifled in the barren egotism of Fichte. He constantly pursued the idea of conciliating realism and

[1] Fichte, b. 1762, d. 1814. Professor at Jena and Berlin. Sämmtliche Werke, 11 vols. 8vo. Berlin, 1845.

[2] Schelling, b. 1775, d. 1854. Professor at Munich. Aphorisms for an Introduction to the Philosophy of Nature. 1806.

idealism. In a fragment on human liberty he thus expresses himself: "The new European philosophy, from its commencement with Descartes, has had the common fault that nature does not exist for it, and that it wants a real foundation. The realism of Spinosa is for this reason as abstract as the idealism of Leibnitz. Idealism is the soul of philosophy—Realism is its body; and it is only in uniting both that we can unite a living whole." "Die ganze neu-europäische Philosophie seit ihrem Beginn (durch Descartes) hat diesen gemeinschaftlichen Mangel, dass die Natur für sie nicht vorhanden ist, und dass es ihr am lebendigen Grunde fehlt. Spinosas Realismus ist dadurch so abstrakt als der Idealismus des Leibnitz. Idealismus ist die Seele der Philosophie, Realismus ihr Leib; nur beide zusammen machen ein lebendiges Ganzes aus."[1]

Hegel[2] was the companion of Schelling at the universities. In his works he attempted to embrace the entire scheme of philosophy. He has left a theory of natural law. The philosophy of law has for its object the idea of law, the conception of law, and its realization. Its point of departure is the will which is free. The will contains—first the element of pure indetermination: next the passage to the determined act. In abstract law man feels himself universal and free; but in personal law he feels that he is a person, and respects the rights of other persons. Hegel treated as fully of the philosophy of right as of the metaphysical part of his system. The existence of right is placed in the fact that every existence in general is the existence of a free will. Right is usually confounded with morality or with duty placed in opposition to inclination. There exists, however, a higher morality raised above this which bids us act according to truly rational ends. The object of development of this higher morality is in the state and history.

[1] Ueber das Wesen der menschlichen Freiheit, s. 427.

[2] Hegel, b. at Stuttgard, 1770, d. 1831. Professor at Jena, Heidelberg, and Berlin. Works, 18 vols. 8vo. Berlin, 1834–1845.

END OF BOOK V.

BOOK VI.

CONCLUSION.

"Διὸ ἀνάγκη ὑποτάσσεσθαι, οὐ μόνον διὰ τὴν ὀργὴν, ἀλλὰ καὶ διὰ τὴν συνείδησιν. Διὰ τοῦτο γὰρ καὶ φόρους τελεῖτε· λειτουργοὶ γὰρ Θεοῦ εἰσιν, εἰς αὐτὸ τοῦτο προσκαρτεροῦντες. Ἀπόδοτε οὖν πᾶσι τὰς ὀφειλάς· τῷ τὸν φόρον, τὸν φόρον· τῷ τὸ τέλος, τὸ τέλος· τῷ τὸν φόβον, τὸν φόβον· τῷ τὴν τιμὴν, τὴν τιμήν. Μηδενὶ μηδὲν ὀφείλετε, εἰ μὴ τὸ ἀγαπᾶν ἀλλήλους· ὁ γὰρ ἀγαπῶν τὸν ἕτερον, νόμον πεπλήρωκε. Ἡ νὺξ προέκοψεν, ἡ δὲ ἡμέρα ἤγγικεν· ἀποθώμεθα οὖν τὰ ἔργα τοῦ σκότους, καὶ ἐνδυσώμεθα τὰ ὅπλα τοῦ φωτός."

Ἐπιστολὴ πρὸς Ῥωμαίους, cap. xiii., 5, 6, 7, 8, and 12.

"Wherefore ye must needs be subject, not only for wrath, but also for conscience' sake. For, for this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing. Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour. Owe no man any thing, but to love one another: for he that loveth another hath fulfilled the law. The night is far spent, the day is at hand: let us therefore cast off the works of darkness, and let us put on the armour of light."

St. Paul's Epistle to the Romans, cap. xiii., 5, 6, 7, 8, and 12.

BOOK VI.

CONCLUSION.

CHAPTER I.

PRUSSIA: STEIN, 1756–1831: HARDENBERG, 1750–1822.

1. During the last half century Prussia has thrown successively into the crucible of reform, the laws of property, the public administration, commerce, industry, political power, and the division of land. Nothing has been left untouched save royalty. Before the time of Napoleon, Prussia was a monarchy absolute in government, military in its political part, feudal in its civil constitution. Now it is nominally a free state, almost representative, occupying an imposing rank as an industrial and commercial power. Stein and Hardenberg have been the principal agents in this work of regeneration; and they have written an immortal page in the secular book which may be called the revolution of Europe, and of which the French Revolution of 1789 forms one chapter. Owing to the reforms effected by these ministers, Prussia is increasing in peace by labour, as the state was formerly aggrandized in war by courage. It is a land of discipline and perseverance. The Zollverein makes for Prussia a commercial empire; the railways unite every portion of the Germanic body with Berlin; and Germany is gradually united to Prussia by a centralization of ideas and interests. The present political structure of Germany, although much simplified, preserves the traces of the feudal divisions. At the era when the nationalities of modern Europe commenced

their development, Charlemagne united the West of Europe, for a time, under his sceptre, by means of conquest and religious unity. But Feudality broke the union, and subdivided the Germanic soil into a multitude of fiefs. During the turbulent period which succeeded, some were destroyed, others increased by successive additions of territory, usually wrested by force or stratagem from less powerful neighbours. Prodigies of boldness and prudence were required to insure the existence of a little state like Prussia, surrounded by powerful and jealous rivals. To create, to maintain, to extend, to organize, in two centuries, a monarchy of fifteen millions of souls, is the achievement of the Great Elector, Frederic William I., Frederic William II., and Frederic William III. This has been accomplished in the country where, in 1640, the first of these princes found only a miserable duchy, ruined by the Thirty Years' War, and with scarcely five hundred thousand inhabitants. The events by which this was accomplished belong to general history; the jurist and economist are more concerned with the legal and social changes by which Prussia, in the short space of thirty years of the nineteenth century, passed from the feudal regime and absolute monarchy to the abolition of privileges, and the opening to the commons of all public offices.

After the battles of Jena, Eylau, and Friedland, the Prussian monarchy appeared annihilated. In 1807, the territory from the Rhine to the Vistula was a conquered country. The cities were French garrisons or magazines. Oppression enervates degenerate nations. But there is in chosen races an irresistible instinct of independence, and a consciousness of human dignity. The French conquest accelerated the independence of the Prussian commons. In the work of social reform there was, as the head, one of those great organizers, so seldom found, lucid in conception, prompt in execution. Baron Stein would be named by Prussia as her greatest minister, if Hardenberg, who completed the work, did not merit a place beside him. Stein, appointed prime

minister in 1807, at once published the celebrated law abolishing vassalage. In his programme he says, that Equity and the principles of good government exact, that each individual may be able to arrive without obstacle at the highest degree of prosperity that his character, his talent, or his fortune may be able to procure for him. The shackles which the ancient laws impose on the transmission and sale of property have injured agriculture, and, in a great degree, neutralized the intellectual and physical activity of the cultivator. By the new law of 1807, the Prussian peasant ceased to be attached to the soil, was free to change his residence, to marry his children, and to give them the profession he wished, without the permission of his lord. The peasant cultivators were enabled to acquire the lands of the nobles, who previously had been, by law, able to sell them only to nobles. Commerce no longer brought with it a forfeiture. All citizens, without distinction, were enabled to devote themselves to tillage, and almost all privileges disappeared. Serfdom was abolished, without the possibility of return. No one, in any way, could be submitted to it, either by birth, marriage, or even voluntary contract. The Law of 1808 completed the first, and granted, in full and complete property to the farmers and peasants of the domains belonging to the crown, the lands which they cultivated, paying a moderate rent. Fifty thousand families immediately became free and proprietors of the lands which they had cultivated. A law of 1811 facilitated the purchase of these rents. Stein thus accomplished, with a stroke of the pen, the reform which Turgot had designed in France, and which he had commenced on a partial scale. Forty years separated the two Statesmen; years full of a terrible lesson, that if progress be not made by reform, it will be made by revolution. In 1808, military rank ceased to be an exclusive appanage of the nobility: valour and merit were the only titles acknowledged, and all citizens were declared admissible to military and civil employments. In November, 1808, the law on the constitution

of towns was promulgated. Up to this time the feudal lords had preserved the exclusive right of nominating the judges and magistrates of the towns and villages which were within their jurisdiction. Justice was sold, and monstrous abuses perpetrated. No authority controlled the acts of these petty tyrants, except the King, when by chance he knew of their crimes. A crowd of local privileges, monopolies, rights, corporations, multiplied since the time of Frederic II., fettered commerce and navigation, maintained dear prices, perpetuated misery. The new law established that henceforth the inhabitants should themselves choose their magistrates and their municipal officers, without the government being able to intervene in the election, or oppose it, except in the great towns, where the choice of those functionaries was presented to their sanction. This control does not exist for small towns. Thus was the right to municipal liberty accomplished. And the municipal council is the primary school of a citizen. This last law was in itself a complete revolution. In place of the triple tyranny of the feudal lords, the military chiefs, and the functionaries of government, was substituted the elective and municipal authority; that is to say, the government which most protects individual liberty.

Shortly afterwards, in the month of November, 1808, Stein was forced to retire. Napoleon intimated to Frederic that he must be removed. But fourteen months had sufficed to overthrow an edifice of four centuries; feudality had disappeared, social emancipation had passed the Rhine, and was established in written law. If this great minister had been permitted to govern his country for twenty years, Prussia would have been long since a representative monarchy, and her civil and political constitution would have been completed. The programme which he published on his entry into office, and his political will, the eloquent manifesto he wrote upon his retirement, do not permit any doubt as to his opinions, and the changes which he desired. These two documents demand as the principal

points—the abolition of the tutelage exercised over the commons by functionaries and privileged persons—the separation of the judicial and executive powers—the development of popular education—a national general representation. "My plan," says Stein, "is this, every citizen, whether he possess a thousand acres or one, whether he be a cultivator, a mechanic, or a merchant, whether he serve his country by physical or intellectual labour, has a right to be represented in the state." He terminates by declaring, that it is necessary, above all things, to attend to the education and instruction of youth. It is on moral and intellectual development that the strength and dignity of man depend.

Hardenberg succeeded to office in 1810. Less imperious, but as firm as Stein, he united to the same social views the practical science of a statesman. A sympathizer with the French Revolution, he had signed the treaty of Basle in 1795. Later, he had represented the National party in Prussia. In 1810, he effected the abolition of all taxes and dues payable to the nobility; destroyed the manorial privileges; suppressed the Teutonic Order; abolished all the guilds and corporations; and proclaimed the principle of liberty of labour. Prussia thus, in five years, accomplished the change which France, with less success, purported to effect in one night,—the celebrated Fourth of August. Stein had fixed at three years, that is to say, at 1810, as the period at which all vassalage was to cease. Hardenberg caused a register or doomsday book to be prepared for the new redivision of the soil;—and by the law of the 14th of September, 1811, the peasants received their properties, and were emancipated in fact, as they had been of right by the law of 1807. In the feudal state of society, two sorts of vassals existed, hereditary vassals, and vassals for life, or who cultivated the soil for a certain number of years. The hereditary vassal became, by the new law, the legal proprietor of two-thirds of the land cultivated by him: to the farmer for life, and the temporary holder, whose right was not consecrated by so long a possession,

half the property was given. The feudal lord retained the remaining third or half. This was a true agrarian law, bolder and more liberal to the peasantry than that for which the Gracchi perished. The Gracchi only demanded the just division of the public land. In Prussia the ancient patrimony of the nobles was divided. There was thus a serious diminution of the property and power of the aristocracy. And certainly the boldness which could devise such a revolution, is as much to be admired as the order with which it was accomplished. This is a very brief summary of the social reforms effected by Stein and Hardenberg. Hardenberg represented Prussia at the Congress of Vienna, when three millions of inhabitants were added to the Kingdom. The nations of Germany had been recompensed for their energetic co-operation in the overthrow of Napoleon, by the promise of a share in the conduct of public affairs. Each of the princes seated at the Congress agreed to give his states a constitution. Hardenberg wished for Germany a parliamentary organization, like that of England, and the ascendancy of his talents and services influenced the assembly. In 1814 he had declared that the least that ought to be accorded to the assemblies of the states, was a regular participation in the making of laws and in the voting of taxes. Hardenberg did more; he demanded, but uselessly, that the populations should have in the Germanic Diet their particular representatives, so as to be able to defend their interests in case of conflict with the sovereigns.

Of the 69 voices called to vote in the Germanic Diet, Prussia, Austria, Saxony, Bavaria, Hanover, and Wirtemberg have 4 votes each—5 secondary states have 3 each —3 principalities 2 each—24 principalities and free towns have each 1 vote. This arrangement places the sovereign direction of the affairs of Germany in the hands of the two great states, Austria and Prussia.

The accession of the peasants to territorial property under the agrarian laws of 1807 and 1811, could only be accomplished gradually; a number of edicts facilitated

the execution of this delicate measure, in regulating by decennial periods the redemption of the obligations attached to the domains. From the official documents it appears, that in Pomerania, Prussia, and Brandenburg, there were in 1821, only 18,256 farms transformed into independent estates. In 1838, Prussia and Silesia reckoned 44,021. The Polish territories belonging to Prussia were emancipated more easily; and there, from 1823 to 1840, in 17 years, 23,395 peasants, formerly farmers or serfs, became free proprietors. This is explained by the cheapness of the land, the population being scattered in the vast plains of Lithuania. The more we advance to the west the more the land is divided. No enterprise of social organization was ever bolder than this division of the land. Hardenberg, by his law of September 14, 1811, gave as property to the hereditary farmer, two-thirds of the land cultivated by him; and to the temporary farmer, or for life, half of the land. Success has justified the measure, despite its apparent injustice, for the abundance of production, and the perfection of cultivation in the lands left to the nobles, have thus compensated them for what they have lost in extent.

Education in Prussia is established on this fundamental principle, written in the law: "The duty of the state is to take heed that all its citizens receive necessary instruction." The natural consequence of this principle has been the law compulsory on all parents to send their children to school, or to cause them to be instructed by a preceptor who has undergone an examination. This law implies, also, in the name of the state, the duty and the right of inspecting education by special agents, who visit the schools. Public examinations are held, but prizes are not distributed. This stimulant to juvenile industry is not approved of in Germany.

The division of the land amongst peasant proprietors, and the compulsory educational system, are the two great features of the modern social organization of Prussia. I do not here refer to the political organization, which is undergoing rapid changes. These two histori-

cal events are well worthy of the attention of the jurist. The characteristic of the age in which we live, is its earnest regard for the welfare of the poorer classes of society. All who are not anchored in the stagnant waters of the past, are thinking, writing, acting for the benefit of the poor. The energies of the most talented men in the advanced nations, are all directed to the solution of the great social problems connected with capital and labour, pauperism, the laws which regulate association and the land—the original source of the wealth of nations. The citizens of the United Kingdom look down too much upon other countries. We visit the Continent on a summer tour, and find nowhere the aristocracy and merchants so rich as the aristocracy and merchants of England; nowhere the comforts of life more numerous for those who are able to pay for them; no harbours so crowded with shipping; no cities so thronged with carriages; no metropolis like London. If the object of society be to create an enormously wealthy class, and to raise to the highest point the civilization of one-fifth of the inhabitants of a country, the system of Great Britain is perfect; for there the classes of the aristocracy, landed gentry, merchants, and manufacturers, are wealthier, more refined, more active and enterprising, more intelligent, and consequently more prosperous, than the corresponding classes of any other country in the world. But, on the other hand, the majority of the people of these Islands are more ignorant, more pauperised, and more morally degraded than the poorer classes of most of the countries of Western Europe. The moral, intellectual, and social condition of the peasants and operatives of those parts of Germany, Holland, Switzerland, and France, where the poor have been educated, where the land has been released from the feudal laws, and where the peasants have been enabled to acquire the land, is higher and happier than that of the peasants of England. Mr. Kay considers that the remarkable improvement which has been witnessed in the condition of a great part of the German and Swiss poor since 1800,

has been the result of two causes, the admirable and long-continued education given to all the children, and the division of the land among the peasants. Wherever the land is free from the feudal laws, and the people are educated, the peasants become proprietors, and are prosperous. Wherever the land is subject to the feudal laws, and the people are left in filth and ignorance, the peasants are pauperised, and live, for the most part, in the lowest physical and moral degradation.

In Germany this truth stares the traveller in the face. Saxony and Bohemia lie side by side. The majority of the people of these two countries speak the same language, profess the same religion, and belong to the same race; but, in Bohemia, the peasants are without education, the land is tied up by the feudal laws; in Saxony, the people are educated, and the land is free.

The natural consequences result. In Saxony there is but little pauperism, the people are well and comfortably clad, beggars are rarely seen. The houses of the peasantry are large, high, roomy, convenient, substantially built, and orderly in appearance; the children are clean, well dressed, and polite in manners; the land is, perhaps, better cultivated than in any other part of Europe; and, as Mr. Kay states, "the general condition of the peasantry is more prosperous than of any other I have seen, except it be that of the peasantry of the Cantons of Berne, Vaud, and Neufchatel in Switzerland, or of the Rhine provinces of Prussia."

In Bohemia, on the other hand, a totally different spectacle presents itself. The moment that the traveller has crossed the Saxon frontiers, he finds himself surrounded by crowds of beggars, who strongly remind him of Ireland. Even the peasants who do not beg, are in rags, often without shoes and stockings, and live in the most wretched cabins.

I have thought it expedient to state the social organization of the system of peasant proprietorship. In Switzerland the system has prospered alike in Catholic Fribourg and Protestant Berne. France and Germany

have undoubtedly improved the condition of their peasantry. But the improvement has taken place at the expense of a partial destruction of that wealthy and refined class, which alone has leisure for the cultivation of those arts and sciences, without which life would be either a sink of level avarice, or, as is apprehended in the rural districts of France, a sink of level poverty. The social problem, in regulating the distribution of wealth, is to elevate the condition of the peasantry, without destroying the aristocracy, the gentry, and the mercantile classes, as they have been destroyed in many continental countries. In Jurisprudence, every legal or political question becomes a mere question in science, and the jurist may rest assured, that no matter how difficult the problem may appear, it will ultimately be solved.

A leading party in Prussia now demands additional restrictions upon the free disposal by sale, deed, or testament of landed estate. After a series of attacks the feudal party have recently succeeded in striking out of the Constitution the Article 42, which guaranteed the general principle of the free disposal of real estate. This victory of the reaction, however, has as yet been a fruitless triumph over the letter of the Charter. The statutable guarantee of the absolute rights of the freeholder was indeed torn out of the code; but the practice, endeared to the country by the experience of forty years, had struck too deep roots to be safely assailed. No positive legislative restraints on free disposal could be carried, though proposals to that effect were again and again made. In 1855 the programme of politics issued by the Right declared it desirable "to restore perpetual entails; to do away with freehold estate, and replace the whole of the soil under the conditions of feudal tenure, endowing it at the same time with all the privileges formerly appertaining to the several sorts of fees; and to make 'movables' part of real estate."

Wild as this scheme for a return to the feudal tenures of the sixteenth century may appear, it is not to be supposed that it has no deeper foundation than a mere

childish romanticism—a political enthusiasm for the Middle Ages, with all their trappings, tournaments, ordeals, wager of battle, and witchcraft. The Right ground their proposals upon very solid motives of public welfare. They complain of the breaking up of great estates, the dispersion—to use their forcible expression—of the soil of Prussia into particles of dust, the ruin of scientific farming, the waste of forest, and rise in the price of fuel; but, above all, the gradual extinction of the class of proprietary yeomen who formerly constituted so considerable a part of the strength of the country. The condition of the French peasantry, pauperized by the continued subdivision of the land into smaller and smaller holdings, is held up as that to which Prussia is rapidly approximating. All these social evils are alleged to flow from the stern enactments of 1807–11, which destroyed feudal tenure, and made land a marketable commodity.

The interests involved in this question are not merely Prussian, but are common to all nations. It may be worth while to give a short summary of the facts, and to see what is really the result of forty years' experience in Prussia of free disposal of landed property. This question, as one of momentous consequence, has been very laboriously sifted by Prussian economists, and a large mass of evidence has been accumulated. These discussions and evidence have been carefully summed up in a recent work by President Lette, to which, together with the "*Landeskultur gesetzgebung des Preussischen Staates*," by Lette and Von Ronne, those who wish for further information are referred.

The ordinances of 1807–11, which removed the restrictions and the feudal burdens on landed property, left that species of property thenceforward to the free play of the ordinary laws of commerce and the natural instincts of parents to provide for their children. The result has been that the number of middle proprietors, owning between 20 and 200 acres English, has increased at the expense of large estates (*Rittergüter*). But this

increase of middle properties is not progressive, but appears to have already reached equilibrium. Secondly, a number of cottier holdings, *i.e.*, below twenty acres English, has been called into existence. However, this also is not a progressive subdivision, but advances in those provinces where it does advance in a less ratio than the increase of population. This is the general result, taking Prussia as a whole. Infinite subdivision is not in progress. There is a law in operation which checks the tendency to the dispersion of property and the breaking up of farms below the extent at which cultivation is profitable. This is a law of custom—not of enactment. It consists in that usage traditional not only in the Prussian provinces, but over a large part of Germany and Switzerland, by which the peasant-proprietor, at the approach of old age, resigns the ownership as well as the occupancy of his farm to one of his children. This child takes the estate and stock upon it at a moderate valuation, usually below its market price. Upon the footing of this valuation the father's (and mother's) realty and personalty are divided among all the children, that child who takes the farm being charged with the payment of his (or her) brothers' and sisters' shares, as well as with a life annuity to the parents. It is customary to stipulate for this life-rent very high, but for the parents to take less than covenanted for. The divisions between the children may be either equal or unequal, but the tendency is to equal division. Where the ready-money for paying the portions of the other children is not supplied by the wife's dower it is easily raised by mortgage. The excellent and simple system of registration of landed property established in Prussia makes mortgage easy. By the system of *Pfandbriefe* a mortgage is made a transferable and marketable commodity, and by the system of *Credit-Instituten* it is made the most secure species of property extant. It will often happen that these provisions for the other children are so charged as to become due by instalments, or as they successively come of age, or on marriage, &c., and thus the incoming possessor is

not driven to take up the money all at once. Still, mortgages are very general on peasant properties, but they are rarely or never in Prussia, as in France, for the purchase-money, but are either for working capital, or, as now described, for the express purpose of keeping the property together. Over-mortgaging is rare in the case of peasant properties; not so in the case of large estates. Where a peasant property is too heavily charged the circumstance may usually be traced to extravagant habits in the owner—hardly ever to the family compact. Speaking generally, the Prussian small proprietors are a frugal race, comfortably off; in some districts even intelligent and well-informed. As a class, they show no symptoms of disappearing before the encroachments of either cottiers, on the one hand, or large landowners on the other; they are, on the contrary, more flourishing and well-to-do than at any former period of Prussian history.[1]

2. It is an interesting study to compare and analyze the manner in which the authors of the principal codes of the nineteenth century have regarded the sources of Law and regulated the interpretation of statutes. The Prussian Code,—Preussische Landrecht,—first abolished the whole of the previously existing common Law—Gemeine recht—and placed itself in its stead. This abolition was consistent, because all that was useful in the earlier law was intended to have been adopted.[2] For the future it determined the mode in which the statutes should be composed, and in which they should be promulgated. This also was not inconsistent, since the code in general embraced in itself many matters of Public Law. The hitherto prevailing general customary law,—Gewohnheits recht,—was comprehended in the abolition of the common Law. The particular customary Law was to be collected within two years, and so far as it was useful was to be united with the Provincial statutes, and placed with them in the Provincial Codes. What

[1] The information contained in the last two pages is taken entirely from letters of the *Times'* Berlin correspondent, 1857.

[2] Publications Patent, s. 1.

was not so adopted, was only to have validity in so far as the general code being referred, in particular passages, to local customs, was thereby amended and supplied. Upon the future development of a new customary law, nothing was determined; without doubt this was to be admitted only under the two above mentioned alternative provisions; and therefore, also, only as particular law. Finally, upon the scientific law it is said, "no regard shall be paid to the opinions of teachers of Law, or the anterior decisions of judges in future judicial determinations" —"auf Meynungen der Rechtslehrer, oder ältere Ausprüche der Richter soll bey künftigen Entscheidungen, keine Rücksicht genommen werden."[1] Savigny remarks on this section, that amongst the decisions of judges are here certainly to be understood præjudicia —die Präjudicien,—not legally valid judgments, although the expression might be referred to both kinds of operations. But that no regard should be paid to these, as well as to the opinions of the Teachers of Law, has certainly only the meaning, that no such binding force is to be attributed to them, as that ascribed to statutes, for no statute can ever prevent their influence upon the views and convictions of the future judge, and his, perhaps, unconscious regard thereto. The French Code Civil contains no direct enactment upon this subject, and consistently, because it does not embrace the Public Law. The abolition of the hitherto prevailing Foreign Law, of the Royal Ordinances, as well as of the Provincial and Local Laws, in so far as their subject matter was treated in the Code, was declared in a separate statute—Loi du 21 Mars, 1804. The code itself contains only the important indirect provision that no Judge shall refuse his decision on account of the obscurity or insufficiency of the statute. In this lies the justification of the Judge, in such cases to extricate himself as he can: the Court of Cassation is a protection against the abuse of this right, so that here also is to be observed a consistent and finished system. Besides the Code re-

[1] Publications Patent, s. 1.

fers, in some few doctrines, such as servitudes, and the contract of hiring, to local customs and regulations. Of the future production of law nothing is said; but without doubt it was intended that a general customary law in future should not arise, and a particular one only in the few cases in which the Code has already referred to Local customs.

The Austrian Code—Oesterreichisches Gesetzbuch—contains the abolition of the Common Law, and the abolition of customs in the introductory patent of 1811. In the Code itself nothing is said of legislation, as it confines itself generally to private law. Customs can only be valid in the matters in which a statute refers to them. Of judicial decisions it is only said that they have never the authority of a statute, and that they cannot be extended to other cases or other persons. The most important matter amongst these enactments is the relation of the Codes to scientific laws: that is, on the one side the enduring influence of literature and judicial practice upon the actual administration of justice and cultivation of law; on the other side, the mode in which the new law should be understood and wrought out by the class of judges. And it is of little importance in what manner this relation has been defined by the Codes, but how the same has been generally viewed, thought of, expected, prepared, and how, in fact, it has taken place.

In this a remarkable distinction is presented as to the relation between the Code and the scientific culture of law in Prussia, Austria, and France. In Prussia the reform had no political cause. The difficulty most felt was connected with the state of judicial literature; the practical part of the science had remained behind the general improvement of the times, and had lost its authority. That the connexion with this literature should be entirely cut off seemed an advantage—nay, necessary. Through the entire undertaking, therefore, there were similar views to those which Justinian entertained, with the difference only which must have proceeded from the more free and intellectual condition of the 19th century.

CHAPTER II.

TITLE BY LABOUR: TENANT RIGHT.

The consideration of the abolition of the feudal tenures in France and Prussia, the abolition of primogeniture, —peasant-proprietorship, and the subdivision of the land —these topics suggest the land question in Ireland. It is one of the most important questions of the day. And it is desirable to discuss it scientifically. The question ought to be treated without direct reference to the existing Tenant Right of Ulster,[1] or to the reforms in the law of real property which are now demanded in Ireland. I desire to ascertain whether, as a pure question of natural law the property in improvements made by the tenant, should not be vested in him alone. The subject is interesting to the jurist, as being the latest development of the law of property applied to land. It is one of the principal advantages to be gained from the study of sociology, that questions formerly termed political are brought within the domain of philosophical inquiry, and subjected to the same inductive processes by which such great results have been obtained in the physical sciences. Not but that it is plain the study of these social subjects transcends all others in importance. It is easy to accumulate examples of the terrible disasters which have accrued to society in consequence of the violation of those principles upon which property ought to be based. The poor labourers of land first attract the attention of modern history in the chronicles of Froissart and Walsingham. These have told us what were the demands of the common people in the insur-

[1] AUTHORITIES:—The Tenant Right of Ulster considered economically, by Professor Hancock: Dublin, 1845. Impediments to the Prosperity of Ireland, by Professor Hancock: Belfast, 1850. The Tenure and Improvement of Land in Ireland, considered with reference to the relation of Landlord and Tenant, and Tenant Right. By W. D. Ferguson and Andrew Vance: Dublin, 1851. A Catechism of Tenant Right: Belfast, 1851. Mr. W. Sharman Crawford's Tenant Right Bill, 1852. Mr. Napier's Tenant Right Bill, 1853. Tenant Right Bills, 1853–1858.

rection of 1381, in England, almost cotemporaneously with the Jacqueries in France and Flanders. The commoners, in 1381, only required the abolition of slavery, freedom of commerce in market-towns, without tolls, and a fixed rent on land, instead of the services due by villeinage. We, in the nineteenth century, perceive that the demands of these poor people were in conformity with natural justice and reason. And in the British Islands we have abolished slavery; there are few tolls except for the providing of public markets and convenient establishments for trade; there is a fixed money rent for land. But the persons who were in the fourteenth century the leaders of legislation, misled by ignorance of their own true interests and those of the people, delayed these reforms, and so far retarded the progress and prosperity of England.

In the British Islands the civilization of the middle and higher classes of society is unparalleled. We have a representative government, public liberty, wealth, knowledge, and the utmost facility of communication. But there is a blot upon this prosperity. That we may not speak of the pauperism of England, the agricultural peasantry of Ireland are worse clothed, worse lodged, worse fed, than any in Europe. In Ireland the recovery of the legal debt of rent alone is resisted by violence. The struggle for the possession of the land alone, of all property, causes bloodshed. The laws, then, which regulate the transfer and the cultivation of the land, are most important for us to study and reform.

The tenant has a natural right to enjoy the complete fruits of his labour and capital expended on the improvement of the land with the consent of the owner. This right should not be left binding in conscience upon the owner as a mere moral obligation, but is a proper right to be protected by the laws of the country, and enforced by them in case of violation. Under the word tenant I include every occupier of land having a terminable interest. I use the word improvement to include every change effected by the tenant on the land, by which the

value of the land is increased on the termination of his tenancy.

The first principle of legislation is to provide that the greatest number of beings may enjoy the greatest amount of good. Nor is this greatest-happiness principle, as it has been termed, peculiar to jurisprudence; but it is the common object of all the arts and sciences. The universal experience of mankind attests that the best method to secure the greatest happiness for the community, so far as it comes within the sphere of jurisprudence, is to provide by law the greatest security for person and for property. The quotation is frequently used—

> "How small of all that human hearts endure,
> The part that kings or laws can cause or cure."

But there are few sayings more erroneous than this; none more ruinous for a man to have implanted in his mind, notwithstanding it was written by Dr. Johnson (as it is said), and published by Goldsmith. Upon the laws of a country, upon the security for the fruits of industry which men enjoy under the laws, civilization and the progress of society most of all depend. The natural rights of man being life, liberty, and property, the state protects him in the enjoyment of the two first, provided he is allowed perfect freedom of action, restrained only by laws tending to promote the greatest happiness of the community. The questions relating to property, and the actions which ought to vest it in the proprietor, are more intricate. The word property is in very frequent use. Persons speak of the rights of property. And it was well said—Property has its duties, as well as its rights. Yet many who use these expressions would be unable accurately to define what they mean by them. Property is the Right of Using. Bentham has defined it as a right conferred and protected by the law, of deriving certain advantages from the thing said to belong to a person in consequence of the legal relations in which he stands towards it.[1] It always includes permanence and exclu-

[1] Bentham's Principles of the Civil Law, part ii. c. 1. Works, Burton's ed. vol. i. p. 327.

siveness. It implies that the use will remain permanent to the possessor, and that he will be able to exclude others from the use of that which is his property. The first point connected with property upon which persons require to have a distinct idea is, that property in civil society exists entirely by force of, and through means of, the law. Property is the creature of law. It may be said that before the institution of civilized society property did exist. If a savage appropriated a fruit, he would use it, and no other would take it from him. But if the possession of the fruit depended only on the strength of the possessor, property did not yet exist. Once, however, that the neighbours agreed to support one another in the peaceable enjoyment of their individual appropriations, property already existed in this, that its violation would be punished by the public force.

The original titles to property, recognised the more fully by nations accordingly as they advance in civilization, are occupancy and labour. One of the first principles of society amongst uncivilized men is that the first possessor be permitted to retain his acquisitions. But man is not destined, like the brute creatures which live upon the earth, solely to consume its spontaneous fruits. His duty is to unite knowledge to nature—to obtain by labour the wealth from which springs material happiness, and which affords rest from toil to those who cultivate the useful arts and the advanced sciences. But if man be destined to earn his bread by the sweat of his brow, he is also naturally entitled to enjoy the fruits of that labour. And upon the security for that enjoyment does the progress of civilization depend. In the infancy of society man's natural rights to life, liberty, and property, are imperfectly recognised. Even yet the absolute rights of strangers are violated in the aggressive wars undertaken by the most polished nations. Even yet slavery disgraces civilization. Even yet the right of labour to establish property is partially denied. The labour of authors in the composition of their works is not yet held to vest the complete property in these laborious workers.

The labour of tenants on the land, as yet, vests no property in them. The rights of labour are, in Positive Law, imperfectly protected. The reasons for vesting property in the occupant or in the labourer are well known. The rights of man to take possession of the gifts of nature are acknowledged. Originally no property is possessed in the rude material of the world. And the first occupant has a right to retain his possessions for three several reasons, as commonly given by jurists. In the first place, if he be protected in such possession, he is thereby spared the pain of disappointment which he would naturally feel at being deprived of those things which he had occupied before all others. Now this suffering to him would, other things remaining the same, be a greater suffering, than the pleasure derived from the acquisition would be a pleasure to others. And in legislation it is a well-known principle, that where we do not violate a positive natural right, we should always adopt that course which, on the whole, is productive of the greatest amount of good. In the next place, the recognition of the title of occupancy prevents the personal contests which might otherwise take place between the first occupant and the successive claimants. Thirdly, the good so secured to him, acting in the character of reward, becomes a spur to the industry of others, who are led to seek for themselves similar advantages. These are the reasons given by Bentham and other jurists. But independent of these reasons there is the strong natural feeling, an innate first principle, that the first occupant has a right to the possession. In time other species of property arise. Ores are worked into implements and machines; the domestic animals are reclaimed from their original savage stocks. The earth was covered with thorns. Labour has made it fertile. Man, from the unformed mass of concealed riches in the earth, has wrought the precious metals—produced the abundant harvests. Industrious labour has conquered the earth, and rendered it habitable for civilized man. Labour is now the principal of the primary titles to property, inasmuch as labour has increased the value

of all material property in the most wonderful degree from the original rudeness of savage life. We at once see this if we compare the present value of the county of Middlesex with its value at the time when Cæsar landed in England. But the increased value has entirely arisen from the application of skilful labour to the natural materials of the entire British empire, whilst its fruits are centralized in London. The right of property arising from labour appears even better grounded than that arising from occupancy, because though it might perhaps be contended that the goods of the earth are originally common to all, and ought to remain so, certainly, the creator at least of property ought to be permitted solely to enjoy it. And the reasons already given for the vesting of property in the occupant, apply with much greater force to the case of the labourer. Because, in addition to the strong natural feeling of right to the result of industry, if the increased value be secured to the labourer, he is spared the pain of disappointment which would otherwise accrue from seeing another enjoy the fruits of his labours; contests are prevented, and the reward acts as a spur to the industry of the community. Thus the same, or more forcible reasons exist for vesting the fruits of his labour in the labourer, as for giving the first occupant the property in the spontaneous fruits of the earth. Locke has described the origin of property in a manner slightly differing from this. According to him, things originally common become the property of the first occupant, not by that tacit agreement to which Grotius refers, but by virtue of the occupant's mixing with them the labour of his body, which is his own, and thus making the things themselves his own. But though differing slightly in terms, all jurists agree that occupancy and labour should create property to be recognised by law.

Labour may be expended upon things already possessed by the labourer, or upon things belonging to another. All jurists have ever allowed that labour expended on a person's own property gives his title increased force. My lands, reclaimed by me, those culti-

vated crops grown by my labour; if it would have been an injury to me to have deprived me of the land uncultivated, of the materials in a rude state, how much would be the injury now to deprive me of them, since each effort of my industry has given to these objects a new value, has strengthened my right and attachment to them, and the desire which I have to keep them?

But the question arises, if any one has applied his labour to a thing which belongs to another, with the tacit consent of the owner, and without having been remunerated for his labour by the owner, to whom ought the increased value of the property belong? This is the entire Tenant-Right question. Practically, this question can arise only in districts where slavery is abolished—where there are free tenant-cultivators, and where it is not customary for the owner to make the permanent improvements necessary to carry on agriculture effectively in the progress of society.

Naturally, this question was originally, in every country, decided against the cultivator. In every case the land originally belongs to the nation or the sovereign, and no person is allowed to possess an absolute interest in it. Among savage nations which live by hunting, the whole vast district belongs to the tribe, and no one can prevent any individual member of the tribe from roaming freely over it; no one can possess, in the land, the permanence and exclusiveness which are the characteristics of property. So also in the Nomadic stage of civilization, absolute property is possessed in the flocks, but not in the land which feeds them.

Several have written as if the principle at the root of the feudal system were something peculiar to Ancient Germany alone. But the idea of the property in land being vested not in the individual, but in the tribe or nation to which he belongs, is not peculiar to the Germanic nations, but is common to all tribes in a certain stage of civilization. Thus by the Celtic custom of gavelkind, on the death of the Cean Finné, or head of a sept, his successor, assembling all the strong men, re-

divided the lands of the sept amongst them at his discretion. So, on the death of every inferior tenant, the sept being again summoned, their lands were thrown into hotch-pot, and a new partition made. This system of property is useful in all the early stages of society; it binds together the individuals of the tribe by the strongest tie. And if any person of the tribe were permitted to acquire absolutely large districts, his isolation from the rest would be an inevitable result. Later, as in Germany, wherever the feudal barons acquired the property in great tracts of land, they speedily endeavoured to become politically distinct from the rest of the nation. But when this system is continued, so that the ultimate property becomes vested in the sovereign, and so that the creation of sub-interests based on the natural titles to property is prevented, the results are bad. Among the partially civilized nations of the East, the ultimate property in land was fixed in the sovereign. In India, still the petty princes exercise absolute power over the land, resuming to themselves, when they please, the subjects' property. And this alone would account for the backward condition of some districts in India, notwithstanding their marvellous fertility. The same state of things may be seen in the Pashalics of Asia Minor and Egypt, where the inhabitants raise only enough of food to keep themselves from starvation, because they have no security for the fruits of their labour.

Ancient Greece displays to us man rising from Oriental sluggishness. But though the political liberty of the Greeks was great, their laws of property were most opposed to liberty. Aristotle and Plato both agreed that land belonged no less to the state than the proprietor. Thus the Oriental idea was not yet effaced; nor was the idea of individual liberty developed. Besides, the Grecian liberty did not extend to all. Slaves principally cultivated the lands. The question of property was decided against the cultivators. So, in the early Roman law, property belonged to the state; property sprung from political rights. Although in the later Roman law, the

claims of labour to establish property were almost completely recognised.

In any discussion upon the law of real property, we should never lose sight of its history. It is the system most dependent upon the ancient polity of the country; and a just view of that polity, and of the changes made in it, is essential to be understood by every enlightened law reformer.

The Feudal system[1] was derived from the customs of the northern nations, which, migrating from the Germanic forests, destroyed the Roman empire, and settled themselves in Western and Southern Europe. The individual German had no private property in the land. His tribe annually allotted him a portion of ground for his support. The ultimate property, or *dominium directum*, was vested in the tribe alone. Thus, Tacitus says, "Agri pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum dignationem partiuntur. Facilitatem partiendi camporum spatia præstant; arva per annos mutant, et superest ager."[2]

Under the pure principles of Feudal law in Western Europe, the sovereign, or feudal lord, is the original proprietor of all the lands within his dominion. His subjects hold only by his favour, and under an authority which manifests itself at each change of tenantry. Sir Henry Spelman[3] defines a feud to be "usus fructus rei immobilis sub conditione fidei; vel jus utendi prædio alieno." Popularly, a feud may be defined as a tract of land acquired by the voluntary and gratuitous donation of a superior, held on condition of fidelity and military service. Originally the fiefs were not even hereditary.[4] Hence, even in later times, when a tenant died, his lands were dis-seized into the hands of his lord, to whom the lands returned as primitive master; the heir was bound

[1] Authorities: Sir H. Spelman's Treatise on Feuds (London, 1723); Littleton's Tenures, Book 2; Sullivan's Treatise on Feudal Law; Gilbert's Law of Tenures; Cragii Jus Feudale (Edinburgh, 1732).

[2] Tacitus De Mor. Germ. c. 26.

[3] Treatise on Feuds and Tenures by Knight's Service, c. 1.

[4] Montesquieu, b. xvi. c. 23.

to resume them from him, and to pay him relief if the lands were fiefs, or other dues, if they were held by base tenures.

Thus, in England, the land being vested in the sovereign as lord paramount, it was by him portioned out in districts amongst the magnates who had deserved well of him in war. And in return for their broad lands, they were bound to serve again upon occasion.

These large districts were impossible to be cultivated by the lord himself; and hence they were subdivided naturally amongst two classes of tenants—those who held by military tenures, and whose duty it was to attend the lord in the field of battle—and those who held by socage tenures, the socmen, whose duty it was to plough the demesnes which the lord kept in his own hands for the support of his own table, or to make an annual return of corn and other provisions for that use and purpose. And so rent is defined by Lord Chief Baron Gilbert to be an annual return made by the tenant either in labour, money, or provisions, in retribution for the land that passes. This is properly a rent-service, and is called so, because the ancient retribution was made by the corporeal service of the tenant, in ploughing his lord's demesnes; and at this day the corporeal service of fealty is still owed.

By the strict feudal law, the breach of any of the feudal services was punished by the forfeiture of the estate. But these feudal forfeitures were afterwards turned into distresses, according to the pignorary method of the civil law; that is, the land that is set out to a tenant is hypothecated, or pledged to answer the rent to be paid to the landlord. And the whole profits of the land were liable to the lord's seizure for the payment and satisfaction of it.[1]

The first important result of the feudal system, as bearing on the juridical question as to the tenant's right to the property in his improvements, is that no person, except the sovereign, could have the absolute interest

[1] Gilbert on Rent, p. 10, Lintot, London, 1758.

in lands, or the dominium directum over them. He could only have an estate in them. This is still continued as a fiction of law. The ultimate ownership remains in the crown. And it is a received and fundamental principle in law, that all lands are holden mediately or immediately of the sovereign. The highest right or estate in lands which a subject can have, is a fee-simple. The term fee—feudum—is used in contradistinction to allodium—defined to be a man's own land, which he possesses merely in his own right, without any rent or service to any superior. This allodial property no subject in the British Islands can have.[1] But the owner of a fee-simple estate may be considered practically the absolute owner, as the whole property in the land is his, subject only to the sovereign's claims. And since the feudal tenures have been changed into socage, the tenant in fee could not have a more absolute dominion over the land, even if the whole doctrine of tenure were abolished. It is plain that the consequence of this system was the feudal rule,—*quidquid plantatur solo, solo cedit.* Because, if any feudal tenant were allowed to acquire the absolute property in the improvements effected by him, the whole feudal system of mutual dependence and obligation would have been at an end. The modern idea of the rights of labour was unknown. The feudal baron expressed his title in the robber motto, "per Deum et ferrum obtinui." Property still originated from political rights; whilst the tendency in modern times is to make political rights spring from property.

In the progress of society, however, there is an essential tendency to freedom. Originally governments exercised the most absolute power over their subjects. Land in Greece and Rome, as at first in England and the other feudal monarchies of modern Europe, belonged to the state, and the possessor enjoyed it as a mere usufructuary. The liberty of the individual, and his absolute independence of the government, provided he do not improperly interfere with the comfort and happiness

[1] 2, Blackst. Com. 105.

of others—these are political innovations upon the old systems of states. And the more advanced each nation becomes, so much the more will the liberty of the individual be developed; so much the more will his right to the property in his works be assured; so much the more will all shackles be removed from the free transfer of property.

In England this tendency to emancipate real property from the feudal system was early developed. But the political freedom enjoyed by the English people has rendered them satisfied with a very slow progress of legal reform. After the Norman conquest, the highest estate which a subject could enjoy in lands was an estate to him and his heirs. This could not be alienated without the consent of the presumptive heir, nor without the consent of the lord from whom the land was held in chief. No estate, greater than for a term of years, could be disposed by testament, except in Kent and some other places which retained the Saxon custom. One reason is given for this: that to effect an alienation of land, a livery of seisin was necessary; that is, a symbolical delivery of possession, either on or in view of the land, by the person who had the actual seisin. This, in the nature of things, could not be effected after the death of the testator. But it is plain that originally the fiefs were at pleasure, then for life. And the feudal tenant had no property in the feud, either inheritable or devisable.

The statute "Quia Emptores," 18 Edw. I., A.D. 1290, allowed all freemen to sell their lands. The enacting part of it is remarkable for its brevity: "Our Lord the King, in his Parliament of Westminster, after Easter, the 18th of his reign, that is, to wit, in the Quinzime of St. John the Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that from henceforth it shall be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such services and customs as his feoffor held before."

Thus the feudal tenants obtained the right of selling the increased value of their lands, the purchasers paying to the chief lord the same rent and services which the vendors had paid.

Later, the devise of lands by will was authorized by the legislature. Devises were first accomplished through means of the equitable estates recognised by the Court of Chancery. These devises were encouraged by the Ecclesiastical Chancellors who presided in that court in ancient times; they studied the civil law and despised the contracted principles of the feudal system. Accordingly, when the devisee of the use could compel its execution in Chancery, uses were frequently devised. These uses were changed into legal estates by 27 Hen. VIII., c. 10. However, the Statute of Wills, 32 Hen. VIII., c. 1, A.D. 1540, empowered all persons seized in fee-simple, by will or testament in writing, to devise to any other person, except bodies corporate, two-thirds of their land held in chivalry, and the whole of their lands held in socage. The statute 12 Car. II. 1660, changed all the feudal tenures into socage. So the right of devising lands held in fee-simple became complete; and thus the ultimate property originally, and still by fiction of law vested in the Crown, became for all practical purposes vested in the tenant in fee-simple.

Notwithstanding the strictness of the feudal rule that no person could have more than an estate in land, and that consequently it was impossible by labour to create an absolute interest in the land, many attempts were made by the judges to relax this principle. But the maxim, barbarous alike in its latinity and meaning, "quicquid plantatur solo, solo cedit," has been implanted too deeply in the foundations of the English law of real property to be repealed by any thing short of legislative enactment.

In the East India Company *v.* Vincent,[1] Lord Hardwicke said—"There are several instances where a man has suffered another to go on with building upon his

[1] Atk. 83.

ground, and not set up a right title till afterwards, when he was all the time conusant of his right, and the person building had no notice of the other's right; in which case the court would oblige the owner of the ground to permit the person building to enjoy it quietly and without disturbance." In Dormer *v.* Fortescue,[1] there is a dictum of Lord Hardwicke which appears to say, that if the owner resort to Chancery for the recovery of the mesne profits, the bona fide possessor would be entitled to deduct the amount of his expenses for lasting and valuable improvements from the amount to be paid by way of damages for the rent and profits. So in Stiles *v.* Cowper,[2] the land had been leased for sixty-one years on a building lease by Sir John Cowper. The tenant had laid out £3,000 in building, and paid the reserved rent up to 1729, when Sir John Cowper died. On his death, the defendant, who was his eldest son, became entitled as first remainder-man. From the year 1729 to 1735, the defendant thought proper to receive the rent from Mr. Stiles, and during that time the tenant, at his own expense, built new offices. The defendant then brought an ejectment, and recovered at law, for want of the usual covenants in building leases. Lord Hardwicke said—"When the remainder-man lies by, and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it, all these circumstances together will bind him from controverting the lease afterwards." A new lease was decreed to be executed with proper covenants, and the plaintiff to hold the premises for the remainder of the term. Here the Lord Chancellor grounded the equity upon the landlord's tacitly permitting the tenant to rebuild. Now, this equitable doctrine would not be stretched too far, if it were held that a landlord, permitting a tenant to build, were bound to give him compensation for such improvements, or else to permit him to sell them at the expiration of the term. In Shannon *v.* Bradstreet[3] Lord Redesdale held, that when the remainder-man lay by, and suffered

[1] Atk. 134. [2] 3 Atkins, 692. [3] 1 Sch. & Lef. 73.

the tenant to lay out money without giving him notice of his intention to impeach his title, it was ground of relief against him. And in The King *v.* The Inhabitants of Butterton,[1] Lawrence J. said: "I remember a case some years ago, in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." And there are many other cases relating to the implied assent which a person gives by standing by and seeing acts done by his tenants and the like without objection.[2] Still these cases apply only to an occupant without notice improving the land with knowledge of the owner, or else to a tenant holding by lease. And they have been decided on the principle of "qui tacet consentire videtur." Even in equity, no tenant from year to year is entitled to be recompensed for his expenditure, although with the knowledge of the landlord, unless he can clearly show that it was with reference to some agreement. Then, of course, "modus et conventio vincunt legem." In Dann *v.* Spinner[3] Lord Eldon says, "I fully subscribe to the doctrine of the cases that have been cited, that this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on, is in many cases as strong as using terms of encouragement; a lessor knowing and permitting these acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment. Still it must be put upon the party to prove by strong and cogent evidence, leaving no reasonable doubt, that he acted upon that sort of encouragement."

These are the principal cases in the courts of justice in England and Ireland, referring to our subject. The abstract right of the tenant to the property in his im-

[1] 6 Term Rep. 554.

[2] Hanning *v.* Ferris, Gilb. Eq. 85; Attorney-General *v.* Balliol College, 9 Mod. 11; Kenny *v.* Brown, 3 Ridg. 518.

[3] 7 Ves. 235.

provements is not recognised. Nor is there any case decided in England, Ireland, or the United States grounded upon common law principles, and declaring that the occupant of land was, without any special contract, entitled to payment for his improvements as against the true owner, when the latter was not guilty of fraud in concealing his title.

Landed improvements may be either in the nature of fixtures, personal chattels attached to the freehold; or they may be such as are incident to cultivation, manurage, drainage, fencing, clearance of rocks and wood, and others of the like nature. In reference to fixtures, there has been a constant tendency in the development of the laws of England to mitigate the severity of the feudal rule. In many cases the judges have so far modified the feudal principle, that the property in improvements effected by him is vested in the tenant having the terminable interest, and not in the tenant in fee-simple.

Fixtures or things of an accessory character annexed to houses or lands originally, all became the property of the landlord on the determination of the tenancy. And still, the general rule of law is, that wherever a tenant has affixed any thing to the demised premises during his term, he cannot sever it without the consent of his landlord. The tenant, by annexing it to the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards. But several exceptions to this rule are now admitted upon grounds of public policy.

The fixtures which a tenant erects upon the demised premises, for the purposes of trade and manufacture, are now exempted from the feudal rule. But it will be shown that they are not so completely exempted, as to vest the entire property in the tenant according to true principles. The first case which in terms recognises the right of a tenant to remove fixtures, is in the Year Book, 20 Hen. VII., p. 13. The question was, whether a furnace attached to the freehold with mortar, should go to the executor or to the heir? And there it is said, "If

a lessee for years, set up such a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation during the term, he may remove them."

Mr Ferard,[1] on examination of the early authorities, considers it by no means clear, that an exception of any sort in favour of tenants was admitted in very early times. He considers, also, that when the exception was introduced, it was extended as fully to other fixtures as to those which related immediately to trade.

But the privilege of a tenant to remove fixtures set up by him in relation to his trade, is absolutely recognised by Lord Chief Justice Holt, in Poole's case.[2] And this decision is now a leading authority. There a soap-boiler, an under-tenant, for the convenience of his trade had put up certain vats, coppers, &c., all which things had been taken under an execution against him, on which account the first lessee brought an action against the sheriff for the damage occasioned to the house, and which he was liable to make good. Lord Chief Justice Holt, held, that during the term, the soap-boiler might well remove the vats he set up in relation to trade; and he said, moreover, that he might do it by the common law, and not by virtue of any special custom in favour of trade and to encourage industry.

In Lawton *v.* Lawton,[3] where the question was, whether a steam-engine set up for a colliery, by a tenant for life, should at his death go to his executors as part of the personal estate, or go to the remainder-man, Lord Hardwicke says, "to be sure in the old cases they go a great way upon the annexation to the freehold, and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the courts have gone upon, of relaxing this strict construction of law, is, that it is for the benefit of the public to encourage tenants for life, to do that which is advantageous to the estate during their term."

[1] Amos and Ferard on Fixtures, 2nd edit. p. 27.
[2] 1 Salk., 368. [3] Atk., 13.

In Penton *v.* Robart,[1] Lord Kenyon says, "the old cases upon this subject leant to consider as realty whatever are annexed to the freehold by the occupier; but in modern times the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state."

In Dean *v.* Allaley,[2] Lord Kenyon said, "if a tenant will build upon premises demised to him a substantial addition to the house, or add to its magnificence, he must lose his additions at the expiration of his term for the benefit of his landlord; but the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage. It has been so held in the case of cider mills, and in other cases; and I shall not narrow the law, but hold erections of this sort, made for the benefit of trade, or constructed as the present, to be removable at the end of the term."

The right of the tenant to remove trade fixtures is therefore established at common law. Lord Ellenborough said, in Elwes *v.* Mawe,[3] "that this exception is founded on the principle, that trade is a matter of a personal nature; whence it followed that an article which is used as an accessary to trade ought itself to be deemed personalty, and not a part of the freehold." It is true that trade in a technical phrase does not savour of the realty. But the public benefit may be regarded as the principal reason for this exception. Enlightened judges have relaxed the strictness of the common law, "that the commercial interests of the country might be advanced by the encouragement given to tenants, to employ their capital in making improvements for carrying on trade, with the certainty of having the benefit of their expenditure secured to them at the expiration of their term."[4]

However, the leading case of Elwes *v.* Mawe[5] expressly decides, that the tenant who erects agricultural fixtures

[1] 2 East., 90. [2] 3 Esp., 11. [3] 3 East., 38.
[4] Amos and Ferard on Fixtures, 2nd edit., p. 32. [5] 3 East., 38.

has no absolute property whatsoever in them, and that he is not entitled to remove them, as in the case of fixtures for the purposes of trade. In this case the tenant had occupied a farm under a twenty-one year's lease from the plaintiff. About fifteen years before the expiration of the lease he had erected at his own expense a beast house, a carpenter's shop, a fuel house, a cart house, a pump house, and fold yard. Previous to the expiration of the lease the defendant pulled down the materials, dug up the foundation and removed the materials, leaving the premises in the same situation as when he entered upon them; and his lessor now brought an action of waste against him for so doing. The question for the court was, whether he had a right to take away those buildings, and it was decided that he had no such right. The facts which led to the action do not appear in the report of the case. It may be supposed that the tenant built either on a promise, or with the expectation that his lease would be renewed; and on his landlord refusing to do so, destroyed the buildings.

The decision in Elwes *v.* Mawe,[1] or rather the state of the law expressed by it, has prevented many millions being expended on the land. Yet there are precisely the same reasons for extending to buildings erected for agricultural purposes, the same privileges which trade fixtures possess. The trade cases have been decided on grounds of public policy, since tenants ought to be enabled to make useful additions to their premises, and avail themselves of modern improvements in the arts and manufactures. Certainly, agriculture is now as much a manufacture as many other brances of industry, the fixtures necessary for which are now legally held to be the property of the tenant. In the present days of Free Trade the farmer of these islands must use the most improved machines and scientific processes in order to compete with the foreigner. But boilers and machines will not be erected when they become the property of the landlord, by being attached to the freehold.[1]

[1] See also 9 Geo. IV., c, 56, s. 24 (Irish).

Lord Ellenborough, in his judgment, observes, "that no adjudged case has gone the length of establishing, that building subservient to purposes of agriculture, as distinguished from those of trade, have been removable by the tenant who built them during his term." And on this ground the case was decided, following the technical feudal rule, in the absence of authority to the contrary. But this decision is open to many objections, even on legal grounds. The privilege as to trade fixtures, is not confined to trade within the meaning of the Bankrupt Acts.

But the making of charcoal, the making of cheese on a farm, or the preparing of grain for a market by means of a threshing machine, may be considered as much a species of trade as the making of cider, the working of a coal mine, or the manufacture of salt from springs on the demised premises. Yet these latter occupations are held by the law of England to entitle a tenant to remove trade fixtures.[1] There is obviously no rule in natural law for the distinction. So gardeners and nurserymen are entitled to sell and remove trees, shrubs, and the other produce of the ground planted by them with an express view to sell, and this on the ground of carrying on a species of trade.[2] But it has been held, that a tenant not being a gardener, is not at liberty to take away a bordering or edging of box planted by himself, or even flowers.[3]

Under the English law, the tenant is entitled to take away certain things affixed to the premises, for the purposes of ornament and furniture. Two principles appear to have concurred in effecting this exception to the general rule. The personal nature of the property was perhaps the original reason why it was not held to be attached to the realty. For the utensils and machines described in the cases, are for the most part perfect chattels in themselves. But the inconvenience to tenants

[1] Coal mine, 2 Wils 169; 7 East., 447, cider mill; 1 T. R., 38; salt mills, ex parte Atkinson: 1 Mont. D. & D., 300.

[2] 2 East., 91; 7 Taunton, 191. [3] Empson *v.* Soden, 4 B. & Ad. 665.

in the enjoyment of their estates, if every slight attachment to the freehold were to change the property in furniture and vest it in the landlord, undoubtedly was considered. All these points in the law of fixtures are the proper subject of legislative enactment. The judges should not be left to spell out exceptions to the feudal rule on grounds of public policy.

The question of Tenant Right in England has not assumed great importance, in consequence of the landlord generally making the permanent improvements on the farm. However, in some districts the custom of tenant-right has arisen. It is thus stated by Mr. Wingrove Cooke, in his Treatise on Agricultural Tenancies.[1] Ordinarily the period over which the current operations and expenses are held to run is limited to the last year of the tenancy, but in some instances it extends to the unexhausted operations of the whole current course of husbandry. Recently, in Lincolnshire and some parts adjacent, it has grown to be applied to all unexhausted tenants' improvements. Sometimes, as in the weald of Kent, Surrey, and Sussex, the whole growth of underwood is the property of the outgoing tenant, but to be left on a valuation.[2]

Such then are the rules of the English law, and such the exceptions grafted upon it by enlightened judges, and by the customs which naturally arise. I shall now consider the rule of the Civil Law upon the question of tenants' improvements.

The Roman law, with respect to political institutions and public liberty, is very inferior to the common law of England; but in all that regards contracts and property, it is one of the greatest monuments of human wisdom. To use the words of Chancellor Kent,[3] it was created and matured on the banks of the Tiber by the successive wisdom of Roman magistrates, statesmen, and

[1] A Treatise on the Law and Practice of Agricultural Tenancies, with forms and precedents by G. Wingrove Cooke, Esq., Barrister. London: Stevens and Norton, 1850.

[2] Ib., p. 220, et seq.

[3] Kent's Commentaries, Lecture xxiii.

sages; and after governing the greatest people in the world for thirteen or fourteen centuries, and undergoing extraordinary vicissitudes on the fall of the Western Empire, it was revived, admired, and studied in Western Europe, on account of the variety and excellence of its principles. It is now taught and obeyed, except in the instances where the feudal law has overcome it, in France, Germany, Holland, and Scotland; in the islands of the Indian Ocean, on the banks of the Mississippi and St. Lawrence. So true it is, in the words of D'Aguesseau, "the grand destinies of Rome are not yet fulfilled, she reigns through the world by her reason, after having ceased to reign by her authority." With respect to the use that may be made of the civil law, in considering principles to be decided in our courts of justice, the judgment of Chief Justice Tindal, in Acton *v.* Burnell[1] may be quoted: "The Roman law furnishes no rule binding in itself upon the subjects of these realms; but in deciding a case upon a principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe." Now, throughout the entire civil law, labour bestowed on the property of another, with the consent of the other expressed or implied, confers the property on the labourer. And as a consequence, the cultivator not being the owner, was entitled on eviction to be reimbursed the entire value of the improvements effected by him. At first the case did not arise, of free tenant cultivators requiring to be reimbursed the value of their improvements. In early times from the prevalence of slavery there were no free tenant cultivators. Nor do the words "landlord" and "tenant," as now understood, occur in the Greek language or in classical Latinity. Proprietors at first, in every country, cultivate their lands by slaves;

[1] 12 M. & W., 324.

and rent makes its appearance in Europe progressively with the abolition of slavery. The question as to the property in improvements made by one person on the lands of another, first arose in the case of an occupant of land without title cultivating it, and the owner afterwards evicting him. In this case the rule of the civil law was, that before assuming possession of the land the owner was bound to reimburse the occupant the value of his beneficial improvements. A *bonâ fide* possessor was entitled to be reimbursed by way of indemnity for the expenses of improvements so far as they augmented the property in value; and the rule was founded upon the equitable principles, "nemo debet locupletari alienâ jacturâ:—jure naturæ æquum est neminem cum alterius detrimento et injuriâ fieri locupletiorem."[1] These rules have been translated into the common law maxim, "nemo debet locupletari ex alterius incommodo."[2] The Roman law, also, in direct opposition to feudalism, allowed the occupant to withdraw from the land the materials by which it was improved. Later, this principle was introduced into the contract of letting and hiring. And whatever species of property a man lets to be used by another, whether houses and lands, movable chattels, or labour, the same principles ought to be applied. So, in the civil law, the contract of letting and hiring—locatio et conductio—included all these sorts of engagements. Now, under the civil law, the lessor—dominus—was bound to deliver the property to the lessee—conductor, colonus—in a condition to serve the use for which it was hired; and to keep it in this condition, making the necessary repairs which the tenant was not bound to make, either by his lease or by the custom of the place.[3] These principles do not merely apply to leases as understood by the law of England, but to any contracts by which lands are let.[4] Now, it appears to have been the custom for the owner to furnish to the tenant materials for manuring

[1] Digest, 50, 17, 206.
[2] Jenkins' Centenary, 4.
[3] Domat's Civil Law, book i. title 4, sec 3, 1. (Dr. Strahan's Translation. London, 1737, fol. vol. i. p. 96).
[4] Domat, vol. i. p. 98.

the ground, and gathering in the fruits, such as barns, tubs, and presses for making wine.[1] "Illud nobis videndum est, siquis fundum locaverit, quæ soleat, instrumenti nomine, conductori præstare; quæque si non præstet, ex locato tenetur."[2] If the farmer made any repairs, or had been at other necessary charges which he was not bound to by his lease, nor by the custom of the place, the proprietor was obliged to reimburse him what he had laid out, or to discount it on the rent.[3] "In conducto fundo, si conductor suâ operâ aliquid necessario vel utiliter auxerit, vel ædicaverit, vel instituerit, cum id non convenisset; ad recipienda ea quæ impendit ex conducto cum domino fundi experiri potest."[4] So, if a farmer made improvements which he was not bound to make, as if he planted a vineyard, or an orchard, or made other improvements of this kind which increased the revenue of the farm, he was entitled under the civil law to recover the expense he had been at on this account.[5] "Colonus, cum lege locationis non esset comprehensum, ut vineas poneret, nihilominus in fundum vineas instituit, et propter earum fructum denis amplius aureis annuis ager locari cœperat. Quæsitum est, si dominus istum colonum fundi ejectum, pensionum debitarum nomine, conveniat, an sumptus utiliter factos in vineis instituendis reputare possit, opposita doli mali exceptione? Respondit, vel expensas consecuturum, vel nihil amplius præstaturum." This reimbursement was made on the following principles, as laid down by Domat in estimating the charges laid out by the purchaser of an estate on improvements. As, if he made a plantation on it the charges laid out were balanced against the fruits arising from the improvements; so that if the fruits reaped from the improvements acquitted the principal sum with interest of the moneys laid out on them, there would be no reimbursement due. However if the fruits came short of the charges laid out on the improvements, the tenant was entitled to recover the remainder of the

[1] Domat, vol. i. p. 101. [2] Ib. l. 19, s. 2, f. f. loc. [3] Ib. vol. i. p. 102.
[4] Ib. b. 55, s. 1, f. f. loc. [5] Ib. vol. i. p. 102.

money he had laid out, both principal and interest. But if the fruits which the tenant reaped from the improvements exceeded the charges he had been at, he was entitled to the advantage of them.[1] In considering the system of real property under the Roman law, it would be improper to omit the jus emphyteusis; as the principle upon which this contract was founded, is directly applicable to the case of land reclaimed by the tenants' industry. Emphyteutical leases were either in perpetuity or for a very long term of years. Since the owners of barren lands could not easily find tenants for them, a method was invented to give in perpetuity such kind of lands, on condition that the grantee should cultivate, plant, or otherwise improve them. Hence the derivation of the word emphyteusis, from ἐν, φυτεύω. It is under contracts of this classification that lands ought to be reclaimed; though now, if, from circumstances, a number of persons be located in a waste district, they cultivate it, and the ultimate owner principally reaps the benefit of their toil.

The law of Scotland has generally adopted the rules of the civil law in reference to tenants' improvements.[2]

In the United States of America questions of this nature have arisen between the squatters who have settled on the lands without title, and who cleared and cultivated them, and the proprietors who purchased the land from the government. The labour of these squatters, or others similarly circumstanced, has been allowed to create an interest in land, called betterment; and this has been the subject of several legislative enactments and judicial decisions. In the Massachusetts Revised Statutes, 1835, it is provided that in the writ of entry upon disseisin for the recovery of any estate of freehold, the tenant shall be entitled in case of judgment against him, to compensation for the value of buildings and

[1] Domat's Civil Law, book i. title 2, sec. 10, art. 17, referred to by book i. title 4, sec. 6, art. 5, vol. i. pp. 77 and 102.

[2] Bell on Leases, 321; Lyons' Landlord and Tenant, 64–69. Erskine's Institutes. This statement is taken from Ferguson and Vance, p. 361.

improvements made by him, or those under whom he claims, if he had been in possession for six years before suit brought, or for a less time, provided he held them under a title which he had reason to believe good. The amount is to be assessed by the jury on suggestion on record of the claim. The amount allowed may be set off against the rent and profits. The demandant may also require to have the value of the land, without the improvements, ascertained; he may relinquish the land on being paid the price; and which the tenant must pay, or lose the value of the improvements. Similar statutes have been passed in Maine, New Hampshire, Vermont, Virginia, Alabama, Ohio, and Illinois. It is true that some of these statutes have been declared by the Supreme Court of the United States to be unconstitutional, and the law is consequently in an unsettled state. The Americans, from their great abundance of fertile unoccupied land, can afford to let it remain so. Though there has been no decision to the effect that the occupant was entitled to the absolute payment, by the owner, of the value of the improvements, still it has been decided in the United States that these considerations have afforded just ground for mitigation of damages in an action for mesne profits; and the value of the permanent improvements made in good faith upon the land, has been allowed to the extent of the rents and profits claimed by the plaintiff.[1] So, in the United States, the rule of law as laid down by Lord Ellenborough in Elwes *v.* Mawe,[2] does not exclusively prevail. And fixtures for agricultural purposes have received the same protection in favour of the tenant, as those fixtures made for the purposes of trade, manufacture, and domestic convenience. In Whiting *v.* Burton[3] the agricultural tenant received a liberal application of the exception in favour of the removal of fixtures. He was allowed to remove from the freehold all such improvements as were made

[1] Hylton *v.* Brown, C. C., April, 1808; Wharton's Dig. Title Ejectment; Jackson *v.* Loomis, 4 Cowan's Rep. 168; Dowd *v.* Fawcett, 4 Dev. N. C. Rep. 95, per Ruffin, C. J. [2] 3 East., 38. [3] 4 Pick. Rep. 310.

by him, the removal of which would not injure the premises, or put them in a worse plight than they were in when he took possession.

All the reasoning upon which the Civil Law gave the value of improvements to the occupant in certain cases, or to the farmer in others—all the reasoning which has guided the enactment of the betterment statutes in the United States—all the reasoning upon which the greatest judges in law and equity have relaxed the rigour of the feudal rule—quicquid plantatur solo, solo cedit—applies a fortiori at the present day to the case of tenants making improvements on the soil. It might have been said under the civil law that the owner should not be compelled to reimburse the occupant for the value of improvements made without his knowledge, and when the occupant originally may have committed a tort by entering on the land at all; it might have been said in the United States, why legalize the claims of these lawless squatters? In England the feudal rule was precise. Yet in all these cases the greatest jurists, whether as legislators or judges, have decided that labour gave the right to the property created by it. The tenant may well be presumed in law to make no improvements without his landlord's knowledge. And if the landlord consent to the tenant's investment of his capital and labour he has no natural right to confiscate it. Rent is the price or hire paid to the owner for the use of the land. If the land rise in value from other causes than the expenditure of the tenant's labour and capital, the landlord has the sole natural right to such increased value. But if the land be improved by the tenant, the improvement ought to be the property of the tenant, on every principle which has led to the institution of property, and upon which property is based. The owner's present right in this country is derived from the feudal law, which belonged to a past age, and was instituted for the purpose of maintaining what has long since ceased to exist —an hereditary military aristocracy.

The tenant, therefore, having a natural right to the

property, it is a proper subject for legislation, and should not be left binding on conscience only, inasmuch as all questions of property are capable of being decided by the judicial power, and damages can always be adjudged for any violation of a right to property. By what legislative means, then, must the tribunals of the country enforce the natural right of the tenant to the property in his improvements? The first step required is a short declaratory act of the legislature vesting in the tenant the property in the improvements effected by him. This property, under whatever name it might be denominated, whether betterment, as in America, or tenant-right, as in England and Ireland, should be left to the operation of the ordinary laws and ordinary tribunals of the country. This property so recognised must be considered under two phases. The tenant may either remain in possession of the land, or may leave it voluntarily or involuntarily. Where the tenant remains in possession, it is not in all cases sufficient that he possess the property in the improvements. The mere recognition of the property of the tenant in his improvements would not be sufficient in the case of long leases, where the value of the land happened to diminish, and the old rent was retained.

The much vexed question of abatement was thus settled by the Civil Law, as stated by Domat:—"The covenant which obliged the farmer to pay his rent, did not extend to that which happened by the hand of man, such as an open force, a war, a fire, and other accidents of the like kind, which no man could foresee. However, the covenant extended to whatever fell out naturally through the injury of the weather, and which it was reasonable to expect, such as a frost, an inundation, and in other cases of the like nature."[1] The words "reasonable to expect," are important, as they confine the rule to the ordinary incidents of the weather. He who held a farm on condition to give to the proprietor a certain portion of the fruits, and to keep the remainder for himself, for his manuring and sowing the ground, could claim nothing

[1] Domat, 98.

from the proprietor either for the tillage or the seed, whatever loss may happen by an accident, even although he should have no crop at all. For their lease made between them a kind of partnership, in which the proprietor gives the land, and the farmer or tenant the seed and the tillage, each of them hazarding the portion of the fruits which this partnership entitled them to.[1] Such was the rule under the metayer system, where landlord and farmer divided the produce between them in certain fixed portions. But the rule of the Civil Law was the reverse, where the farmer paid a fixed money rent. If a farmer, who had a lease only for one year, and was obliged to pay his rent in money, reaped nothing because of some accident, such as a frost, a storm of hail, an inundation, and other causes of the like nature; or even because of some act of man; as if, in time of war, their whole crop was destroyed or taken away by force, he was discharged from paying his rent, or was entitled to receive it if he had already paid it.[2] "Si labes jacta sit, omnemque fructum tulerit, damnum coloni non esse; ne supra damnum seminis amissi, mercedes agri præstare cogatur."[3] For, as Domat says, "It was but reasonable that in the case of a lease, where the lessor secures to himself a rent, the lessee should be secure of enjoying something; and besides the lease was of the fruits which the farmer should reap, and which it was presupposed that he would reap." The farmer, of course, had no right to an abatement of his rent for inconsiderable losses. But if the damage which happened to a lessee for a year (tenant from year to year), proved to be considerable, although the loss were not of all the fruits of the farm, yet the farmer was entitled to an abatement of some part of his rent, such as the judge in his prudence should think fit to decree.[4] And so in the Digest: "Omnem vim cui resisti non potest, dominum colono præstare debere."[5] And again, if the lease were for two or more years, and there happened in some of them accidents

[1] Domat's Civil Law, book i. tit. 4, s. 5. 3, vol. i. p. 100. [2] Ib. sec. x. v. 4.
[3] l. 15, s. 2, f. f. loc. [4] 1 Domat, 100. [5] l. 15, s. 2, f. f. loc.

which occasioned losses, whether of the whole fruits, or a great part of them; and that these losses were not compensated by the profits of other years, the farmer might demand an abatement of his rent according as the quality of the loss, and the other circumstances might render his demand just.[1]

Such were the equitable rules of the Civil Law on this subject, based upon the first principles of natural justice. And if the tenant farmers, holding by leases in the United Kingdom, who suffered by the great failure of the potato in 1846–1847, were living under the Civil Law, they would have been entitled to demand an abatement of their rent, and enforce that demand in a court of justice. This principle of course applies only to the years of failure, and has no reference to future contracts, or future tenancies.

We have next to consider the case of the tenant, whether voluntarily or involuntarily leaving the land.

Where two persons possess the property in one thing, the concurrence of both is necessary to its use. Now, in case of the tenant being desirous to leave the farm, the landlord has always the power to prevent him from selling his improvements, by refusing his consent to the purchaser's entry. This case requires consideration. The whole result of modern legislation is to leave the owner as far as possible the absolute disposal of his own property. And I do not think that it would be beneficial to society, that the landlord should not be left the absolute control as to whatever contract of tenancy he might choose to make. How, then, is the tenant to be reimbursed the value of his improvement, if his landlord virtually refuse his consent to their sale? It has been proposed by some that the tenant should have a right of action against the landlord for the value of the improvement. But it is plain that exchanges should be free. The landlord should not be compelled to purchase. The only remedy for this case is the application of the doctrine of lien.

[1] Ib. vol. i. p. 100.

In the law of England, a lien is a right to retain property until a debt due to the person retaining has been satisfied.[1] A lien is not, in strictness, either a *jus in re* or a *jus ad rem;* but it is simply a right to possess and retain property, until some charge attaching to it is paid or discharged.[2] The principle of natural law, that whosoever has increased the value of property by the direction or with the consent of the ultimate owner, has a lien on the property until he has been fully reimbursed for his services, is already recognised in favour of artisans and others who have bestowed labour upon the property in its repair, improvement, or preservation. And it may be stated as law, that where an individual has so bestowed labour and skill in the improvement of any species of property, except what is known to our law as real property, he has a lien on it for his charge. Thus a miller and a shipwright have each a lien.[3] Even a trainer has a lien for the expense of keeping and training a race-horse, for he has by his instruction wrought an essential improvement in the animal's character and capabilities.[4] There are many other cases distinct from the principle of improvement by labour, in which lien is recognised by our courts of law and equity. Thus, upon grounds of public policy, the rescuer of goods from the perils of the sea has, at common law, a lien for salvage. And it also, in numerous instances, exists by the usages of trade recognised and upheld. I shall now consider what are the reasons to exclude real property and its improvements from the principle of natural law, recognised in the case of personal [movable] property.

In procedure, the right of lien and set off are analogous so far that the effect of each is to prevent circuity of action. Lord Mansfield says in Green *v.* Farmer :[5] "Natural equity says that cross demands shall compensate each other by deducting the less sum from the greater, and that the difference is the only sum that can

[1] 2 East. 233.
[2] Story, Eq. Jur. s. 506.
[3] *Ex parte* Ockenden, 1 Atk. 235; Franklin *v.* Hosier, 4 B. and A. 341.
[4] Bevan *v.* Waters, M. and M., 236.
[5] 6 Burr. 220.

be justly due." The principle is obviously correct, that where two parties are mutually indebted, the balance only shall be paid; and that one of the parties shall not be compellable first to pay the debt which he has incurred, and then left to sue for that to which he is entitled. This principle was long ago recognised by the Romans in the doctrine of the civil law, termed *compensatio*. By the common law of England the equitable principle of set off was not recognised. And to remedy the inconvenience resulting from the circuitous mode of procedure, various legislative enactments have been passed from the 4 and 5 Anne, c. 17, to the 6 Geo. IV., c. 16. This series was only applicable to mutual credits in cases of bankruptcy; but the 8 Geo. II., c. 24, enables defendants, in all cases, to set off debts due to themselves, against those for which they were sued. The courts soon extended the statutable doctrine of set off to the cases of lien: and by a liberal construction of the meaning of mutual credit, effected substantial relief in favour of creditors holding the goods of bankrupts. Lord Hardwicke says, in *ex parte* Deeze,[1] "It would have been indeed a hardship to have said that mutual credit should be confined to pecuniary demands, and that if a man had goods in his hands belonging to a debtor of his, which could not be got from him without an action at law, or a bill in equity, that it should not be considered as mutual credit." And in all possible cases the courts extended their protection in behalf of creditors holding the goods of their debtors. "Convenience of commerce and natural justice," says Lord Mansfield, in Green *v.* Farmer,[2] "are on the side of liens." It appears to me that the property in his improvements being acknowledged to be rightfully vested in the tenant, the most simple method to insure him its enjoyment, in case of disputes, is to give him a lien on the improved property.

I would, therefore, propose that the doctrine of lien ought to be extended to the case of a tenant improving his land; and that he ought to be permitted to retain

[1] 1 Atk. 228. [2] 4 Burr. 220.

the land so improved, until he be either reimbursed in money, or by perception of the profits of the land.

A lien, so distinguished from a pledge, can generally be retained only as a security for the debt due, and, with a very few exceptions, cannot be sold or relinquished for a moment without a waiver of the right possessed. It is necessary to allude to this principle in reference to the present question. The tenant may be anxious to remove, and employ his labour and capital elsewhere. I do not see any valid objection to his being permitted to sell or deal with it like any other species of property.

The feudal laws were well adapted to maintain a territorial military aristocracy. They were natural and inevitable in the progress to civilized life. At the beginning of the feudal times, all Europe was in a state of warfare. Nation contended with nation, tribe with tribe; the barons rebelled against their sovereigns and made war with one another. The right of private war was, of the privileges of feudalism, the most difficult to abolish, and those who contended for it to the last, have been regarded as heroes,—witness Goetz von Berlichingen. So hard a task is it to prevent barbarians from plunder and massacre. So hard a task is it to instil into their minds, that all men have positive natural rights to life, liberty, and property. In those disastrous times the great majority of the population were slaves, from whom there was continual apprehension of revolt. It was therefore necessary to keep on foot a military force equipped in the best manner, and ready on a moment's notice to take the field. The idea of a standing army, raised principally from the lower classes of society, and supported out of the public general taxation, was almost unknown. The difficulty of collecting a large revenue by taxation, prevented it from being accomplished. The only means remained to allot the land under military tenures. The system of holding land by military services to this day prevails amongst the nations of the East Indies, the Cossacks of Russia, the Tartar tribes subject to China, and amongst all nations arrived at a

similar stage of civilization. Under the feudal system, the distribution and tenure of property were required which should always supply the feudal nobility with arms. Hence arose primogeniture, which kept property in large masses, sufficient to maintain bodies of equipped retainers under individual feudal chieftains. No absolute property in land could have been permitted, because then the land would have been possessed, discharged of the feudal burdens. No property in land could have been permitted to be created by labour, because no right was recognised in the enslaved cultivators to hold land, except at the will of the governing classes. These institutions were natural in the progress of society from slavery to freedom; they were then most beneficial; they perpetuated the feudal chivalry, the feudal liberty, which are amongst the most prominent features of modern European civilization. The feudal system is now obsolete, except in its injurious results in preventing the free transfer and cultivation of land. In its most prominent features it has been eliminated from civilization by the good sense of mankind; but its influence remains in preventing labour from being expended on the earth, by the confiscation of its fruits; in preventing the labourer from rising in the social scale, by keeping the land bound in large portions, and rendering its sale in small farms almost impossible. Homage and fealty to a feudal suzerain are abolished. Rent is no longer service to a lord, but it is the hire paid to an owner for permission to use the land. The taxation of the country is no longer paid in rent-service to the crown. The institution of standing armies, a result of the division of labour natural in the progress of society, has abolished the necessity for the system of military tenures. As a consequence, the necessity no longer exists for the rule of law which vests in the ultimate owner the sole absolute property in the land, with all expended upon it. All the remains of the feudal system in the law of landlord and tenant, by which contracts in respect of land are distinguished in their incidents from mer-

cantile contracts,—all the extraordinary privileges of landlords are injurious to society at large.

During the process of civilization, different classes are successively emancipated, and legal protection is given to the fruits of their industry. In the Oriental nations castes are originally established in the strictest manner; from which it was impossible for those in the lowest ranks to free themselves. It was useless for those in the lowest caste to labour, except for the mere purpose of subsistence, since the fruits of their labour were not secured to them. They consequently did not labour. Fortunately for Europe, only one caste was retained by the Grecian civilization,—the great caste of slavery. The early Greek philosophers advocated the system of castes; because, although perceiving that the division of labour was necessary to the progress of society, they did not also perceive that the division of labour arose naturally and inevitably, and that there was no necessity for legislative enactment to secure it. But the Hellenic energy burst through the shackles which philosophy thus endeavoured to cast around individual freedom. Originally, we find the cultivators all slaves. And, consequently, throughout Europe, until the Christian religion abolished slavery, the masses of the population were steeped in wretchedness, worse even than that of the South and West of Ireland at the present day. Even in this state, the inherent tendency to freedom is developed. The master found it impossible to deprive his slave of the whole fruits of his toil. He secreted a portion, which finally became legally his own, under the name of *peculium* in the civil law. In the next stage the slave becomes a serf, a villein labouring his lord's demesne, giving him the greater portion of his labour, and liable to the uncertain feudal services. The cultivators next cease to be *adscripti glebæ;* but the feudal services still continue uncertain. Finally, a fixed money rent is adopted. However, the tenant-cultivator is not yet completely free; for the fruits of his labour expended on the land are not yet completely his own. But the right

of labour to confer property in all other cases being acknowledged, why should it be denied only in the case of the tenant of land? It may be hoped, therefore, that in the absence of political or social reasons to the contrary, this extension of the great principle of PROPERTY, one of the original bases of society and civilization, will speedily be adopted. Throughout all free countries persons are now permitted, with few exceptions, to devote themselves to whatever pursuits in life they please, and to enjoy in the fullest manner the fruits of industry. Property is by degrees being emancipated from every political element. The property of man in men has been abolished by those states the farthest advanced in civilization. Monopolies of all kinds are disappearing. The freedom of commerce, and the freedom of labour are at last recognised in most instances. It remains for society to emancipate the labour of the cultivators now personally free, and by simply vesting in them the property in the result of their labours, to permit their willing industry to be expended on the land. Behold the man who rents his acres without security for the fruits of his industry. His cabin is only half thatched; his fields are slovenly; whatever money he has is hid; it is not freely expended on the soil, for there is no certainty that he can reap the fruits of it. He is clothed in rags; he dare not even appear prosperous, lest the rent be raised. On the other hand, behold the peasant who has the consciousness of security protected by the law. This indefatigable worker waters the earth with the sweat of his brow, and obtains by labour the pacific conquest of the soil. He takes from the hours of the day all that human strength can give to industry; and the kindly earth repays his labour with interest. Civilized society would gain much, if those peasants who now have their labour only partially free, were enriched by that consciousness of property which security for its fruits would give them. Thus arriving into the ranks of property, they would be in all things more worthy citizens of a free community. Soldiers of agriculture, let them become the best guardians of pub-

lic order. In England, the most advanced nation in the world, there ought to be the best institutions for all. A wealthy landed aristocracy, a learned, laborious, and a commercial middle class, ought to be combined with an independent and prosperous peasantry, such as are found amongst the vine-dressers of Vevay, and the hardy mountaineers of Fribourg and Berne.

CHAPTER III.

Jeremy Bentham, 1748–1832.

The Works of Jeremy Bentham, published under the superintendence of his executor, John Bowring, eleven volumes, 8vo; Edinburgh, Tait, 1843. Mill's Essay on Bentham; London and Westminster Review, August, 1838. Introduction to the study of the works of Jeremy Bentham, by John Hill Burton. Dumont's Bentham, three volumes; Brussels, 1832.

1. The works of Bentham have been characterized by John Stuart Mill as destined to renew a lesson given to mankind by every age, and always disregarded; destined to show that speculative philosophy, which to the superficial observer appears a thing so remote from the business of life, and the outward interests of men, is in reality the thing on earth which most influences them, and in the long run overbears every other influence save those which it must itself obey.

Bentham was born in London, and was educated at Westminster School, and at Oxford University. He took his degree there in 1763, being then only sixteen years of age. In the same year he commenced to attend the lectures of Sir William Blackstone at Oxford, and we have recorded in his own writings the impressions they made upon him. Bentham says, "I attended with two collegiates of my acquaintance. One was Samuel Parker Coke, a descendant of Lord Coke, a gentleman commoner, who afterwards sat in Parliament; the other was Dr. Downes. They both took notes, which I attempted to do, but could not continue it, as my thoughts

were occupied in reflecting on what I heard. I immediately detected his fallacy respecting natural rights. I thought his notions very frivolous and illogical about the gravitating downwards of hæreditas, and his reasons altogether futile, why it must descend and could not ascend, an idea, indeed, borrowed from Lord Coke. Blackstone was a formal, precise, and affected lecturer, just what you would expect from the character of his writings, cold, reserved, and wary, exhibiting a frigid pride. But his lectures were popular, though the subject did not then excite a wide-spreading interest, and his attendants were not more than from thirty to fifty. Blackstone was succeeded by Dr. Beaver, who read lectures on Roman Law, which were laughed at, and failed in drawing such audiences as Blackstone drew."

The first compositions of Bentham that ever appeared in print were two letters in the *Gazetteer*, in 1770, written in defence of Lord Mansfield. Bentham says he had been deluded by the eloquence of Lord Mansfield, and fascinated by his courtesy of character. He was then about twenty-three years of age. He now began to work at the principles of Morals and Legislation, which he originally intended to term "The Critical Elements of Jurisprudence." He soon relinquished the idea of practice at the Bar, and devoted himself for the remainder of his long and useful life to travelling, to lengthened correspondence with the great men of all nations on the subject of legislation, and to the composition of those works on Jurisprudence, the influence of which has been felt for the last fifty years in every page of the legislation of England. It is not my intention to give any of the details of his life. The tenth and eleventh volumes of Dr. Bowring's edition of his works contain those particulars in full.

The merits of Bentham as a jurist and as a politician have been stated by Mr. Mill in his admirable essay, and I can do little more than repeat his words. "Who, before Bentham, dared to speak disrespectfully, in express terms, of the British constitution, or the British law. The

changes which have been made, and the greater changes which will be made in our institutions, are not the work of philosophers but of the interests and instincts of large portions of society, recently grown into strength. But Bentham gave voice to these interests and instincts. Until he spoke out, those who found our institutions unsuited to them, did not dare to say so, did not dare consciously to think so. They had never heard the excellence of those institutions questioned by cultivated men, by men of acknowledged intellect; and it is not in the nature of uninstructed minds to resist the united authority of the instructed. Bentham broke the spell. It was not Bentham, by his own writings, it was Bentham through the minds and pens which those writings fed, through the men in more direct contact with the world, into whom his spirit passed. Bentham's knowledge of human nature is wholly empirical; and the empiricism of one who has had little experience. He had neither internal experience nor external; the quiet, even tenor of his life, and his healthiness of mind, conspired to exclude. him from both. He never knew prosperity nor adversity, passion nor satiety; he never had even the experiences which sickness gives; he lived from childhood to the age of eighty-five in boyish health. He knew no dejection, no heaviness of heart. He never felt life a sore and weary burden; he was a boy to the last. Self-consciousness, that demon of the men of genius of our time, from Wordsworth to Byron, from Goethe to Chateaubriand, and to which this age owes so much, both of its cheerful and its mournful wisdom, never was awakened in him. How much of human nature slumbered in him he knew not, neither can we know. He had never been made alive to the unseen influences which were acting on himself, nor consequently on his fellow-creatures. Other ages and other nations were a blank to him for purposes of instruction. He measured them but by one standard; their knowledge of facts, and their capability to take correct views of utility, and merge all other objects in it. His own lot was cast in a generation of the leanest

and barrenest men whom England had yet produced; and he was an old man when a better race came in with the present century. He saw, accordingly, in man little but what the vulgarest eye can see; recognised no diversities of character but such as he who runs may read. Knowing so little of human feelings, he knew still less of the influences by which those feelings are formed. All the more subtle workings, both of the mind upon itself, and of external things upon the mind, escaped him; and no one, probably, who in a highly instructed age, ever attempted to give a rule to all human conduct, set out with a more limited conception, either of the agencies by which human conduct is, or of those by which it should be influenced."

2. I now, following the plan hitherto adopted, proceed to give an analysis of the principal works of Bentham. In the work on Morals and Legislation, Bentham defines utility as that property in any thing whereby it tends to produce benefit, or prevent unhappiness to the party whose interest is considered. The interest of the community is the sum of the interests of the several members who compose it. An action may be said to be conformable to the principle of utility, when the tendency it has to augment the happiness of the community is greater than any it has to diminish it. The principle of utility is not susceptible of any direct proof; for that which is used to prove every thing cannot itself be proved.

A principle may be different from that of utility in two ways. It may be different by being constantly opposed to the principle of utility. Bentham terms this the principle of asceticism. Secondly—A principle may be different from that of utility, by being sometimes opposed to it, and sometimes not, as it may happen. Bentham terms this principle the principle of sympathy and antipathy. The principle of asceticism is that which approves of actions in as far as they tend to diminish happiness. The principle of asceticism has been seldom applied to the business of government. There is but

one famous historical example in which this principle has been so applied—Sparta.

There are four sanctions or sources of pleasure and pain: the Physical or Natural; the Political or Legal; the Moral or Popular; and the Religious. These sanctions may be illustrated by the considerations operating upon the mind of a witness in a court of justice, and urging him to speak the truth. First, it is easier to speak the truth than to tell a lie. Truth is natural. A lie demands invention and reflection. Secondly, the political or legal sanction punishes the liar for his perjury. Thirdly, the moral or popular sanction has in every age of civilized men attached infamy to the name of a liar. Lastly, the religious sanction by an oath appeals to the Supreme Being, and invokes his displeasure upon the perjurer. The example of a witness in a court of justice, influenced by these four sanctions, sometimes is given as an illustration. But the student of Jurisprudence may, as an exercise, apply these four sanctions to every legal act that is done. The term sanction originally means the act of binding, and thence by a common grammatical transition, it means any thing which serves to bind a man. A sanction is a source of obligatory powers or motives.

In the seventh chapter of his work on Morals and Legislation, Bentham defines the business of Government to be the promotion of the happiness of society, by rewards and punishments. In every transaction which it examined with a view to punishment, there are four articles to be considered,—the act which is done,—the circumstances under which it is done,—the intentionality which may have accompanied it,—and, lastly, the consciousness, unconsciousness, or false consciousness which may have accompanied the act. The intention, with regard to the consequences of an act, will always depend upon two things; first, the state of the will or intention with respect to the act itself; secondly, the state of the understanding or perceptive faculties with regard to the circumstances with which it is, or may

appear to be, accompanied. There are two other articles on which the general tendency of an act depends; and on which also depends the demand which it creates for punishment; first, the particular motive or motives which gave birth to it; secondly, the general disposition which it indicates. Acts may be distinguished into several ways for several purposes; first, into positive and negative; that is, into acts of commission, or acts of omission or forbearance; secondly, acts may be distinguished into external and internal; that is, corporeal or mental. Circumstances are the things which stand around an object. A circumstance is said to be material, when it bears a visible relation, in point of causality, to the consequences. A circumstance is said to be immaterial, when it bears no such visible relation.

The intention or will may regard either of two objects; first, the act itself; secondly, the consequences of the act. If the will merely regard the act itself, without the consequences, the act may be said to be unintentional. A motive, in the most extensive sense, is any thing that can contribute to give birth to, or even to prevent, any kind of action. Substantially, it is no more than pleasure or pain operating in a certain manner. Bentham defines a disposition as a kind of fiction, or fictitious entity, feigned for the convenience of discourse, in order to express what there is supposed to be permanent in a man's frame of mind. A man's disposition may be considered in two points of view; first, according to the influence which it has on his own happiness; secondly, according to the influence which it has on the happiness of others. When the act which a motive prompts a man to engage in is of a mischievous nature, it may be termed a corrupting or seducing motive. Any motive which, in opposition to the former, acts in the character of a restraining motive, may be styled a tutelary or preserving motive. Tutelary motives may be divided into standing or constant motives, and occasional motives. The standing tutelary motives are four in number: good will, or benevolence, the love of reputation, the desire of friend-

ship, and the motive of religion. Of the occasional tutelary motives there are two principal, namely, the love of ease, and the desire of self-preservation, as opposed to the dangers to which a man may be exposed in the prosecution of the action. These dangers may be either of a purely physical nature, or else they may be dangers resulting from moral agency. In the latter case, they are the dangers resulting from the conduct of the persons to whom the act, if known, may be expected to prove obnoxious. This last danger may be classified as the danger of detection. The danger of detection may be divided into two branches; first, that which may result from any opposition that may be made to the enterprise by persons on the spot; secondly, that which respects the legal punishment that may await upon the issue of the enterprise. The force of two of the standing tutelary motives, namely, the love of reputation, and the desire of friendship, depends upon the fear of detection. But this is not the case with the other two motives, benevolence and religion.

There are four rules for measuring the depravity of disposition indicated by an offence. First, the strength of the temptation being given, the mischievousness of the disposition, manifested by the enterprise, is as the apparent mischievousness of the act. Secondly, the apparent mischievousness of the act being given, a man's disposition is the more depraved the slighter the temptation is by which he has been overcome. Thirdly, the apparent mischievousness of the act being given, the evidence which it affords of the depravity of a man's disposition is the less conclusive the stronger the temptation is by which he has been overcome. Fourthly, where the motive is of the dissocial kind, the apparent mischievousness of the act and the strength of the temptation being given, the depravity is as the degree of deliberation with which it is accompanied. The mischief of an act may be divided into two shares. The first is the primary mischief, or the mischief sustained by an assignable individual, or by a multitude of them. The next is the secondary mis-

chief, which taking its origin from the former extends itself either over the whole community or over some other multitude. The primary mischief of an act may again be divided into two other branches; first, the original; secondly, the derivative. The original mischief is that which directly falls upon the individual. The derivative mischief is that which befals other persons in consequence of the delinquent being a sufferer. This derivative mischief or suffering may arise from their interest in the sufferer, their sympathy with the sufferer, or the loss of the support which the sufferer was bound to give them. The secondary mischief may frequently be seen to consist of two other shares—pain and danger.

In the thirteenth chapter of the treatise on Morals and Legislation Bentham treats of the cases unfit for punishment. Bearing in mind the principle of utility, or the greatest-happiness principle, punishment ought to be inflicted only in so far as it promises to exclude some greater evil. Admitting, then, that there has been a violation of a right, there are four cases in which punishment ought not to be inflicted; first, where it is groundless; secondly, where it must be inefficacious; thirdly, where it is unprofitable or too expensive; fourthly, where it is needless. The principal cases where the punishment must be inefficacious are where crime is committed in extreme infancy or by persons labouring under insanity or intoxication. The evil of punishment divides itself into four branches, by which so many different sets of persons are affected. First, the evil of coercion or restraint is felt by those who are restrained from doing the act by the fear of the punishment; secondly, the evil of apprehension is experienced in the pain which a man who has exposed himself to punishment by the commission of a crime feels at the thought of undergoing it; the third is the evil of sufferance, or the actual undergoing of punishment; the fourth branch of the evil of punishment includes the pain of sympathy and the other derivative evils resulting to the persons who are in con-

nexion with the several classes of original sufferers. The principal case where punishment is needless is where the purpose of putting an end to the practice may be attained as effectually at a cheaper rate than by terror, —for example, by instruction.

In the fourteenth chapter Bentham enumerates four objects of punishment; first, to prevent all offences; secondly, to prevent the worst offences; thirdly, to keep down the mischief; fourthly, to prevent it at as cheap a rate as possible. There are four properties to be given to an assignment or lot of punishment;—first, variability; secondly, equality; thirdly, commensurability—that is, where two offences come in competition together, the punishment for the greater must be sufficient to induce a man to prefer the less; fourthly, characteristicalness—that is, that the punishment should be characteristic of the offence. This property of characteristicalness is useful as a mode of punishment in three different ways. It renders a mode of punishment before infliction more easy to be borne in mind. It enables a mode of punishment, especially after infliction, to make the stronger impression—that is, it renders it more exemplary. It tends to render it more acceptable to the people—that is, it renders it more popular. The effects of unpopularity in a mode of punishment are analogous to those of unfrugality. Unpopularity in a mode of punishment causes discontent amongst the people and weakness in the law.

Bentham first divides offences into five classes—private, semi-public, self-regarding, public, and multiform —that is, those which may be detrimental in any one of the ways in which the act of one man can be detrimental to another. Multiform offences may be placed under two great heads—offences by falsehood, and offences against trust. Offences by falsehood are four in number; simple falsehood, forgery, personation, and perjury. A person is said to be invested with a trust when being invested with a power or with a right, there is a certain behaviour which in the exercise of that power or of that right he is bound to maintain for the benefit of some

other party. Accessory offences are those which without being the very acts from which the mischief in question takes its immediate rise, are in the way of causality connected with those acts.

Bentham points out the limits between the provinces of private ethics and legislation. Legislation interferes in a direct manner only by punishment. And punishment ought not to be applied where it is groundless, inefficacious, unprofitable, or needless. Where the punishment would be groundless it is not the province of ethics to interfere, for if there were no evil in the act done there is no occasion for ethics to interfere. The cases where the punishment would be unprofitable constitute the great field for the exclusive interference of private ethics. Punishment as applied to delinquency may be unprofitable in both or either of two ways; first, by the expense it would amount to even supposing the application of it to be confined altogether to delinquency; secondly, by the danger there may be of its involving the innocent in the fate designed only for the guilty. With regard to the cases in which political punishment as applied to delinquency may be unprofitable in virtue of involving the innocent with the guilty, the danger arises from the difficulty there may be of fixing the idea of the guilty action—that is, of subjecting it to such a definition as shall be clear and precise enough to guard effectually against misapplication. This difficulty may arise from either of two sources—the one permanent, *i.e.*, the nature of the actions themselves; the other occasional, *i.e.*, the qualities of the men who may have to deal with those actions in the way of government. This difficulty in so far as it arises from the latter of those sources may depend partly upon the use which the legislator may be able to make of language—partly upon the use, which, according to the apprehension of the legislator, the judge may be disposed to make of language. The degree in which private ethics stand in need of the assistance of legislation is different in three distinct branches of duty. Of the rules of moral duty, those which seem to stand

least in need of the assistance of legislation are the rules of prudence. If one do wrong in respect of prudence, it must arise either from some inadvertence, or misunderstanding, or missupposal, with regard to the circumstances on which his happiness depends. The rules of probity are those which in point of expediency stand most in need of assistance on the part of the legislator.

A book of Jurisprudence can have but one or other of two objects; first, to ascertain what the law is; secondly, to ascertain what it ought to be. In the former case it may be styled a book of expository Jurisprudence—in the latter a book of censorial Jurisprudence, or a book on the art of legislation. The circumstances which have given rise to the principal branches of Jurisprudence which we are wont to hear of seem to be as follows:—First, the extent of the laws in question in point of dominion; secondly, the political quality of the persons whose conduct they undertake to regulate; thirdly, the time of their being in force; fourthly, the manner in which they are expressed in regard to punishment.

In point of extent, Jurisprudence is either local or universal. Its next division regards the political quality of the persons whose conduct is the object of law. These may be considered either as members of the same state or as members of different states, and so Jurisprudence is either internal or international. Bentham next divides internal Jurisprudence into national and provincial.

3. I now, following Bentham, proceed to give his rules as to the codification of laws, and the chief heads of a complete code.[1]

Bentham gives five rules concerning the method of codifying laws. First—That portion of the laws which most clearly bears the impression of the will of the legislator ought to precede those portions in which his will is shown indirectly. And for that reason the Penal Code ought to precede the Civil Code; because in the Penal Code the legislator exhibits himself to every individual

[1] General View of a Complete Code of Laws. Bentham's Works, vol. iii. p. 158.

—he permits, he commands, he prohibits, he traces for every one the rules of his conduct. Secondly—The laws which most directly promote the chief ends of society ought to precede those the utility of which, how great soever, is not so clearly evident. Thirdly—The subjects which are most easily understood should precede these of which the conception is less easy; for example, in the Penal Code, the laws which protect the person, as the clearest of all, ought to precede those which protect property. After these may necessarily be placed those which concern reputation and those which relate to the legal condition of individuals. Fourthly—If in speaking of two objects, the first may be spoken of without referring to the second, and on the contrary the knowledge of the second supposes a knowledge of the first, it is right on this account to give priority to the first; thus in the Penal Code offences against individuals should be placed before offences against the public, and offences against the person before offences against the reputation. Fifthly—Those laws, the organization of which is complete, that is to say which possess every thing necessary to give them effect and to put them in execution, ought to precede those of which the organization is necessarily defective.

Bentham divides offences into four classes—private offences, self-regarding offences, semi-public, and public offences. Simple private offences are subdivided into offences against the person, reputation, property, and condition. A man's condition in life is constituted by the legal relations he bears to the persons who are about him; he is surrounded by duties, which being imposed on the one side, give birth to rights on the other. These conditions may be such as are capable of displaying themselves within the circle of a private family, or such as require a larger space. The conditions constituted by the former sorts of relations may be styled domestic, those constituted by the latter, public. Domestic conditions are founded upon natural relations, or upon relations purely legal. Bentham reduces civil conditions

to three classes—fiduciary charge, rank, and profession. A fiduciary charge takes place between two or more interested parties, when one of the parties being invested with a power or a right, is bound in the exercise of this power and this right by certain rules for the advantage of the other party. This relation constitutes two conditions, that of the trustee and that of the truster. It is useful to classify self-regarding offences, in order to show in general what are the offences which ought not to be subject to the utmost severity of the laws, and in order that those offences may be discerned with respect to which exceptions should be made for particular reasons.

Bentham states the advantages of his own classification. First—It is the most natural; that is, most easy to be understood and remembered. In reference to a particular individual, a natural classification is that which presents itself first to his mind, and which he comprehends with the greatest facility. Secondly—This classification is simple and uniform. Thirdly—This classification is best adapted for discourse, and best adapted for announcing the truths connected with the subject. Fourthly—This classification is complete. There is no imaginable law to which it is not possible by its means to assign its proper place. Fifthly—It displays intention. Sixthly—The classification is universal.

There are several principal characteristics of the classes of offences. The characters of the first class composed of private offences, or offences against assignable individuals, are: First—The individuals whom they affect in their primary mischief are constantly assignable. Secondly—The offences admit of compensation and retaliation. Thirdly—There is always some person who has a natural and peculiar interest to prosecute them. Fourthly—The mischief they produce is obvious. Fifthly—In slight cases compensation given to the individual affected may be a sufficient ground for remitting punishment.

The characters of the second class, consisting of self-regarding offences, are: First—In individual cases it is often questionable whether they are productive of any

primary mischief at all. They produce no secondary mischief; that is to say, they do not affect any other individual unless by possibility in particular cases; and they affect the whole state in a very slight and distant manner: Secondly—They do not admit of compensation or retaliation.

The characters of the third class, consisting of semi-public offences, as manufactures injurious to health, sale of unwholesome food, fraudulent lottery, false reports as to the public funds, are: First—The persons whom they affect in the first instance are not individually assignable: Secondly—They are in the second instance: Thirdly—There is never any one particular individual whose exclusive interest it is to prosecute them: Fourthly—In no cases can satisfaction given to any one particular individual affected by them be a sufficient ground for remitting punishment.

The fourth class consists of public offences, or offences against the state.

Bentham states the true principle of division of the Civil Code. The first general title of the Civil Code is of Things. The Roman division of things into corporeal and incorporeal was erroneous. That was a fiction, and all these incorporeal things were only rights to the services of men. The second general title of the Civil Code is of Places. Both men and things only exist in a certain place. The circumstance of place will, therefore, be often necessary in the law for determining both men and things; sometimes for fixing the species and sometimes the individual. There is no method more exact and more universal for determining an individual and for defining him than saying that at a certain time he occupied a certain portion of space. The things to be comprehended under this title are—What is the situation, what the extent of the territory which the law comprises within its empire?—What are its physical divisions, what its political divisions and subdivisions?

The third general title of the Civil Code is of Times. To the fixation of place, it is necessary to add the fixa-

tion of Time. Uniformity in the measurement of Time, as well as in Measure, Weight, and Quantity, is still the wish of philosophy, and is still unaccomplished.

The fourth general title of the Civil Code is of Services. From things we pass to men, considered as the subject of property. Man may be regarded under two aspects: as capable of receiving the favours of the law; or as capable of being subjected to its obligation.

The fifth general title of the Civil Code is of Obligations. In former treatises on Jurisprudence the idea of obligation is too often independent of the idea of services. A bad law is that which imposes an obligation without doing a service. The notion of obligation is posterior to the notion of service, because the idea of an obligation pre-supposes an act serviceable to others; and the obligation of rendering such a service, is the obligation of performing an act serviceable to others. To be subject to an obligation is to be the individual whom the law directs to perform a certain act.

The sixth general title of the Civil Code is of Rights. Rights are created by imposing obligations, or abstaining from imposing them. The compilers of the Roman law divided all rights into two portions, of which one regards persons, and the other things, under the names *jura personarum*, and *jura rerum*. There is no correspondence between the two terms, except as to form—there is none as to sense. Rights of persons, mean rights belonging to persons, rights conferred by the law on persons; but if we transfer this explanation to rights of things, it is absurd to say that things have rights belonging to them. Instead of rights of things, it is proper to say rights over things. There are other errors of the Roman lawyers upon this matter. According to them, there are cases in which rights only subsist by means of the laws, and other cases in which they have subsisted independently of the laws. These rights which they represent as only subsisting by the law of nature, or the law of nations, or some such phrase, have no existence at all, or only exist in consequence of civil laws,

and by them alone, exactly in the same degree as those rights whose existence they attribute to the same laws.

The seventh general title of the Civil Code is of Collative and Ablative Events. To give to a certain event the quality of Epoch, from which to date the commencement of a right, is to render that event *collative* with respect to that right. To give to a certain event the quality of Epoch, from which to date the cessation of a right, is to render this event *ablative* with respect to this right. What Bentham terms a collative event has been commonly called title or means of acquisition. To be the individual in whose favour a collative event occurs is to have a title. The two original titles to property are occupancy and labour—the two secondary titles are consent and inheritance. Possession may be either actual or ancient. The possession may be simply actual, when the party has openly provisional security, so long as no collative event is found which operates in favour of his adversary. That may be called ancient possession which, in consideration of its duration, is determined by law to have the effect of destroying every collative event which might operate to the prejudice of the party, and in favour of his adversary. Such is the case which has been characterized by the word prescription. There is a difference between physical and legal possession. Physical possession is that of the subject itself, whether a thing, or the services of a man. Legal possession is altogether the work of the law—it is the possession of the right over a thing, or over the services of a man. Bentham gives examples of the difficulty of questions concerning possession. A street porter enters an inn, puts down his bundle on the table, and goes away. One person puts his hand upon the bundle to examine it; another puts his hand to carry it away, saying—"It is mine." The inn-keeper runs to claim it in opposition to both. Of these four men, which is in possession of the bundle? In my house is a desk occupied by my clerk; in this desk there is placed a locked box belonging to my son; in this box he has deposited a purse intrusted

to him by a friend. Then, in whose possession is the purse?—Mine, my clerk's, my son's, or his friend's?

Bentham terms a dispositive event, what is called in the writings of jurists, *title*. He says—the terms collative and ablative have the double inconvenience of length and novelty. He has tried to make use of the word title, and has found it equivocal, obscure, and defective, whilst the other two terms are clear, sufficient, and yield instruction in themselves.

The eighth general title of the Civil Code is of Contracts. Contracts are acts of collation or investment. They are conventions proposed by individuals, and adopted by the sovereign, provided they are valid. Entire liberty for contracts ought to be the general rule. If there be any to which the sanction of the legislator should be refused, it will always be for some particular reason. The reasons for declaring some contracts invalid or unlawful ought to be drawn from the nature of the contracts themselves, inasmuch as they are contrary to the public interest, or to the interest of a third party, or to that of the contracting parties. A contract subsisting between two persons is when there exists between them a disposition either of goods or services, or a legal promise made by the one for the benefit of the other. A disposition, or a transfer of goods, is an act in virtue of which a change is made in the legal rights of two or more persons with regard to a certain object. Contracts may be either momentary or permanent. They may be divided into three classes:—1st. Promises;—2ndly. Dispositions or transfers of goods from one party to another;—3rdly. Mixed contracts containing both dispositions and promises. Dispositions and promises may be either unilateral or bilateral, according to whether there is reciprocity in the agreement or not. The Constitutional Code is principally employed in conferring powers on particular classes of society, or on individuals, or in prescribing their duties. Powers are constituted by exceptions to imperative laws. Every complete law is in its own nature coercive or discoercive. The coercive law commands or

prohibits. It creates an offence, or, in other words, it converts an act into an offence; for example—"Thou shalt not kill." The discoercive law creates an exception. It authorizes a certain person to do a thing contrary to the first law; for example—"The judge shall cause such an individual to be put to death." Duties are created by imperative laws addressed to those who possess powers; for example—"The judge shall impose certain punishments according to certain prescribed forms." Hitherto the political powers of one government have been with regard to the political powers of another government objects which have no common measure. There is no universal political grammar. No one has yet ascertained the primary elements of offices of state. The first difficulty in framing a uniform plan for the distribution of the political powers in any state, is to ascertain from what language shall be taken the vocabulary of offices; for example, there is no relation between the consuls of France and of Rome and the consuls of commerce—the Emperor of Germany and of Russia—the ancient French peer and the peer of England.

It is almost impossible, in giving an account of a foreign constitution, to employ any denomination to which the readers shall not attach ideas different from those which it is intended to convey. This confusion would cease if it were possible to employ a new nomenclature not composed of official names, but expressing the elementary political powers exercised by the different offices. Two methods may be employed for this decomposition:—

First—By considering the ends towards which they are directed: for example, the end of interior or exterior security: Secondly—By considering the different methods by which those ends may be attained.

An international code would be a collection of the duties and rights existing between the sovereign and every other sovereign.

It may be divided into the *universal* code and the *particular* codes. The first would embrace all the duties to

which the sovereign was subject, and all the rights with which he was invested, with regard to all other nations without distinction. There would be a particular code for every nation with which, either in virtue of express treaties, or from reasons of reciprocal utility, he had recognised duties and rights which did not exist with regard to other states.

Bentham makes two divisions of the laws which compose a particular code; first—Laws executed; secondly—Laws to be executed. The first are those which regard the two sovereigns in their character of legislators, when in virtue of their treaties they make conformable engagements in their collections of internal law. Laws to be executed are: First—Those which are fulfilled simply by abstaining from the establishment of a certain branch of internal law: Secondly—Those which are fulfilled by exercising, or abstaining from exercising, a certain branch of sovereign power: or by sending, or abstaining from sending, assistance by troops or money to another sovereign power: Thirdly—Those whose fulfilment only regards the personal conduct of the sovereign. The second great division is into the laws of peace and war. Bentham gives a plan of the Financial Code. The receipt of taxes bears the same relation to their assessment as procedure bears to substantive law.

The first object of finance is to find the money without constraint, without any person experiencing the pain of loss and privation. The second object is to take care that this pain of constraint and privation be reduced to the lowest term. The third object is to avoid giving rise to the evils accessory to the obligation of paying the tax.

Bentham next gives a plan of a Procedure Code. In arranging matters of procedure it is necessary to regard four principles: First—The order of the offences which it is intended to combat, or of rights not enjoyed, which it is intended to cause to be enjoyed: Secondly—The order of the ends which can be proposed in combating the evil effects of each offence: Thirdly—The chronological order of the steps which may be taken on the one side

or the other in the pursuit of those ends. Fourthly—The power to be exercised provisionally for securing the justiceability of the accused.

The first rule as to a code of laws is that it ought to be complete. The desirable object of the laws with regard to style is that in them a citizen may have presented to his mind an exact idea of the will of the legislator. This idea will not have been correctly placed on his mind, either when the words employed do not convey any idea, or when they present only part of the idea intended to be conveyed, or when instead of this idea they present another altogether different, or when they include other propositions with those intended by the legislator. Hence clearness and precision are essential qualities in style.

In all cases of want of precision the fault arises either from the choice of the words or from the manner in which they are put together; that is to say, either from terminology or syntax.

A code of laws will always be too large to be committed to the memory entire; hence arises the necessity of separating into distinct codes those facts which are intended for the use of particular classes who have need to be more particularly acquainted with one part of the laws than another. Brevity of style may regard sentences and paragraphs as well as the whole body of the law. Prolixity of style is most vicious when it is found in connexion with the expression of the will of the legislator.

The faults opposed to brevity which may be found in paragraphs are: First—Repetition; Secondly—Virtual repetition or tautology; as, for example, when the King of France is made to say, "we will, we direct, and it pleases us;" Thirdly—Repetition of specific instead of generic terms; Fourthly—Repetition of the definition instead of the proper term which ought to be defined; Fifthly—The development of phrases instead of employing the several elleipses; as, for example, when mention is made of the two sexes in cases where the masculine would have marked both; Sixthly—Useless details, for

example, as regards time. It is most desirable that clauses should be short; and they ought to be numbered.

Bentham gives the following rules in drafting: First—It is proper, as much as possible, not to put into a code of laws any other legal terms than such as are familiar to the people. Secondly—If it be necessary to employ technical terms, care ought to be taken to define them in the body of the laws themselves. Thirdly—The terms of such definitions ought to be common and known words, or at least the chain of such definitions ought always to finish by a link of such words. Fourthly—The same ideas should always be expressed by the same words.

This is in the first place a means of abridgment, because the explanation of the term once given will serve for all times.

Next follows the method of the interpretation, conservation, and improvement of the code.

Bentham was of opinion that it would be necessary to forbid the introduction of all unwritten law. But the historical examples of what occurred after the completion of the Codes of Justinian and Napoleon show that inevitably law changes with the face of society, and judges must decide on the new cases as they arise.

If a new case occur not provided for by the code, the judge may point it out and indicate the remedy; but no decision of any judge should be cited as law.

Bentham again says that if any commentary should be written in the code, it should not be allowed to be cited in any court of justice, in any manner whatever, either by express words or by circuitous designation.

Whenever a passage is obscure it ought to be cleared up rather by alteration than by comment.

The more words there are, the more words are there about which doubts may be entertained.

4. The first chapter of the "Organization of Tribunals"[1] is on the aim towards which the judicial establishment should be directed. The end of legislation is

[1] Draught of a Code for France, 1790. Works, vol. iv. p. 288. The analysis is condensed from the title "Organization of Tribunals" in Dumont's Bentham.

the greatest happiness of the greatest number. Such is the principle of utility in the greatest extension which can be given to it. Fidelity in the law is nothing else than the exact accomplishment of the promises of the law towards each individual. It is this which constitutes rectitude in judicial decisions; and this rectitude is the great end towards which all law should tend. Procedure is the course taken for the execution of the laws. The inconveniences of procedure are known by the names of delay, expense, and vexation or impediments. In always regarding rectitude of decision as the principal end we should consider rapidity, economy, and simplicity, as secondary or collateral ends which should never be lost sight of. If the pursuit of justice be too costly, too slow, or too vexatious, even prudence will often be content with suffering the greatest wrongs rather than have recourse to an onerous mode of redress.

All the operations of judicature range themselves under two great heads:—1st. A violated right; 2nd. A disputed right. In case of the latter, a decision must be given in favour of one of the parties. In case of the former, there are circumstances, and these the most common, in which it will be sufficient to put an end to the mischief, and compensate the party injured. There are others in which it will be necessary to punish the offender. There are four well-marked degrees in a judicial cause:—1st. The exposition; that is, the statement of the case on both sides; 2nd. The production of proofs. 3rd. The judgment; 4th. The execution.

The fourth chapter is on the principles which should determine the number and the distribution of tribunals. The necessity for the number and distribution of tribunals arises both from the quantity of business, and from the distance of places, in order to spare parties the time and expense of a journey to distant tribunals. There are three reasons against the multiplicity of tribunals:—1st. The expense of supporting a multiplicity of judges; 2ndly. The difficulty of finding a number of men capable of filling well all these places of judicature.

3rdly. One important reason against the multiplicity of tribunals is drawn from the application of the principle of publicity, the efficacy of which, as applied to tribunals, depends not entirely on the number of individuals present, but also on their intelligence. In a village or town where each individual is occupied with his own affairs, it is difficult to get an audience numerous and intelligent enough to appreciate the conduct of the judge.

In the fifth chapter Bentham argues in favour of every tribunal having an universal jurisdiction. From government acting in opposition to this principle several inconveniences arise: 1st. A superfluous number of tribunals. If there be as many as the geographical distance enacts, they will suffice for the decision of all business; and every one added to them will be useless—2ndly. A paucity of tribunals—3rdly. Uncertainty in several cases as to which is the proper tribunal. When special tribunals are created a new science is created, a labyrinth is placed on the road leading to justice, and a skilful person is required to direct those ignorant of the detours. Hence expense, embarrassment, and uncertainty are incurred—4thly. This division weakens publicity. All the heterogeneous tribunals possessing some fragment of jurisdiction divide the public attention.

The seventh chapter is on English circuits. There are four great advantages attributed to the English system of circuits. 1st. Only a small number of judges is required. Hence men are obtained distinguished for their capacity, as well as their character: their reputation inspires security; and being placed conspicuously before the public, their moral responsibility is as great as it could be under any system. 2ndly. Although it is necessary to give large salaries, in order to obtain the best men, still the entire establishment is economic, compared with the expense of tribunals established in the counties. 3rdly. Justice travels, and the suitors remain at home. 4thly. The judges in going circuit will not contract those local partialities, of which it is difficult

for resident judges to divest themselves. There are three inseparable inconveniences attached to circuits. 1st. What is gained to the state in the salaries of the judges, is lost to suitors in the vast expenses incurred by advocates and attorneys. 2ndly. The system causes delay, and especially a detention of prisoners from one circuit till the next. 3rdly. During the time which elapses from one circuit to another, a great number of incidents unfavourable to justice may occur. The longer the time that elapses between the facts and the proof, the more difficult it is to ascertain the truth. Proofs vanish, witnesses are tampered with; one person dies, another travels.

The eighth chapter is on the judges, and the mode of their election. The first question is, whether the judges should be elected by the public or their representatives, or nominated by the supreme chief of the state. In England the judges of the land are always nominated by the sovereign; but the nomination of judges is not an essential prerogative of the sovereign. In France, before the Revolution of 1789, the kings had nothing to do with the nomination of the judges. Judicial offices had become hereditary in certain families, or were sold by the possessor like land. The only advantage of this system was that the court exercised no direct influence over the judges, either by the hope of advancement, or the fear of deprivation. In aristocracies, whether elective or hereditary, the judicial power has been ordinarily confounded with the administrative powers. This mode is the most vicious of all. It causes all responsibility to vanish. It gives a continual temptation to employ the judicial power in order to augment the political. In a republic there is a choice between two methods,—either to give the election of the judges to an administrative senate, or to give it to that portion of the people which nominates to all the other magistracies.

The ninth chapter is on periodical elections for judges, with an interval of exclusion. Publicists who are in favour of the immoveability of the judges, have devised a

means to remedy the inconveniences arising from the permanency of the judges—periodical elections, with intervals of compulsory exclusion. The advantage of this plan is to be able to depose a judge without clamour or injustice. The disadvantages are threefold. The advantage of having tried and approved judges is lost. It is impossible to have a great number of men fit for the office of judge in a country: all the arts, all the sciences, and all the complicated relations of social life furnishing difficult questions for the decision of the judges. Next, periodical elections would place the judges under the necessity of paying court to men of influence, who would have control over the elections. Lastly, the system of periodical elections aggravates the inequality of fortunes. Suppose a man who lives by his profession, and if you make a judge of him for five years, when he ceases to be a judge, what will become of him? Must he return to the bar, the counter, or the workshop? Must he turn in a circle—be alternately a public man and a private man—form attachments and break them—become partial and impartial by turns—contract pecuniary obligations with those who employ him, and preserve no recollection of them?

The tenth chapter is on the number of judges that ought to be in each tribunal. In a system of complete publicity one judge suffices. But Bentham is of opinion that one judge is preferable to many. His opinion, which will appear at first a paradox, requires to be supported by many proofs. Unity in judicature is favourable to the essential qualities in a judge. The probity of a judge depends on his responsibility to the tribunal of public opinion, or to that of the laws. This responsibility falls completely only on one judge, when in the presence of the public he has no other support than the integrity of his judgment. But if we follow the effects of plurality in tribunals, it weakens the responsibility of each judge exactly in proportion to the number of judges.

The history of courts consisting of a number of judges, proves two things:—their independence of pub-

lic opinion; and their ascendancy over a party, more or less numerous, of the state. For example, during the existence of the Parliament of Paris, a senate that united to the real power of the judicature brilliant prerogatives in politics, the greater part of the nation respected its decisions, whether good or bad, solely because they were the decrees of the parliament. In England, also, when the House of Commons quashed the election of Wilkes, this measure, evidently unjust and subversive of the rights of the electors, was regarded as legal by the greater number of persons, solely because it was decreed by parliament. Thus, the deference of the public to a court consisting of a number of judges, emboldens them to acts of injustice which no single judge could dare to commit. Another inconvenience, no less grave, results from a plurality of judges. It furnishes judges with the means of avoiding the individual responsibility of an unjust decision, by saying, it was not my advice, but the general opinion was so strong, that I could not resist it. Thus, weakness passes for modesty, and laziness for deference. Number assists the judges in another manner, in supporting censure, and strengthening them against public opinion. The more numerous a body is, the more it tends to form a state within a state, a little public that has its particular *esprit*, and which protects, by its applause, such of its members as may have encountered general disgrace. The suffrages of a body, though inferior in number to the public, may be superior in weight. Those with whom we are in most familiar intercourse, are those whose esteem it is most important to obtain. Hence is the preference given to debts of honour over those of justice; hence, too, the spirit of party. A numerous body affords greater facilities for corruption. Another inconvenience of the plurality of judges is that it furnishes an individual with the means of prevarication without compromising himself. Bentham applies the term *half-prevarication* to simple absence, because in appearing to give no vote, one really gives half a vote to the wrong side. Unity is an admirable means of soon

discovering the real conduct of an individual. Rapidity is a great advantage in the system of unity. The more judges take part in business, the more useless delays there will be. Every opinion produces arguments, every question is multiplied and divided. If the members of a tribunal are in the habit of being unanimous, they will make it a point of honour not to depart from it, through the fear of weakening in the people the belief in their infallibility; but if there be a dissentient judge, there must be, of course, adjournments and prorogations. Bentham has hitherto considered unity in its relations to the ends of justice; but the economy which results from the system is of great importance. One able man at a high salary will do more work better than twenty inferior persons at lower salaries. The reasons against plurality in judicatures being so strong and peremptory, it may be natural to ask why the system of plurality has generally prevailed in France? The prejudice in favour of plurality of judges had its first source in ancient usage; and this usage was generally introduced by motives which had no relation to public utility. When government sold the offices of judicature, judges and courts were multiplied, so as to be a subject of national complaint. Independently of this accidental cause, the prejudice was founded on two considerations:—1st; the vulgar notion that two heads are better than one; 2ndly. the political notion of the advantage of dividing powers, in order to limit them. The first of these objections Bentham has answered in the previous observations. As to the second, all the utility it possessed was derived from secrecy in procedure. The division of power may have served to mitigate despotism in tribunals, as the plurality of the judges introduced an element of publicity.

The eleventh chapter is on the power of delegation. Bentham proposes a novel plan of giving to each judge the nomination of a delegate, with all the powers of a judge, and under the same responsibility, but subordinate to his principal, either in the exercise of his func-

tions or by the duration of his office, and to serve without salary. One advantage of this scheme is to form a number of subjects known by comparison with one another, in order to furnish to the electors a sufficient number of candidates for a proper choice. The choice of election must commence somewhere, and the first choice cannot be better placed than in the hands of a man who enjoys the public confidence, and who ought to know well the necessary qualities in an employment which he has made his principal study.

The salary of the judge should be provided solely from the public treasury, without any emolument or fee received from the parties or from any other judicial proceedings. In England it has been necessary to raise the salary of the judges to a sum which appears exorbitant to the other European nations, because in England the great judges are only taken from the order of the advocates, and naturally from amongst those of them who have acquired the greatest reputation. Now, as the profits of the bar are very considerable for those who have attained this eminence, barristers will not renounce them in order to accept judicial employments at a great pecuniary sacrifice. It has been necessary, then, to raise the salaries of the judges to keep them in relation with the salaries of the principal advocates. On the system which Bentham proposes the judges are taken from a class of graduated legists, in which the class of delegates forms a preparatory school; and it would not be necessary to raise their salaries to those of the first rank at the bar. He remarks, too, that in the case of simple laws and procedure, it could not be imagined that the profession of advocate could ever be so great a source of wealth as it is in England for those of the first rank.

There is a general reason against plurality of employments in the hands of an individual. The monopoly is unjust and impolitic. In accumulating amongst a small number of individuals the objects of general desire, not only other individuals, but the public also, are deprived of the recompense applicable to the encouragement of

true merit. But there are still more conclusive reasons for giving no other employment with that of the judge. The obligation of daily attendance on his tribunal is incompatible with the due discharge of any other public function. If the judge be not always occupied with his business, he should be always ready; if he be occupied with other duties, justice will be exposed to the destruction of proofs, and litigants will be exposed to delay. If the judge be otherwise employed his reputation for probity is endangered. All employments bring with them a diversity of social relations, and of associations and interests. All attachments are sources of partiality. And though it is possible that the probity of a judge might not suffer, his reputation would suffer; and confidence in his judgments would be weakened.

The fourteenth chapter is on gradual promotion. Gradual promotion was the favourite idea of Rousseau in his plan for the government of Poland. No part of the application of this principle is more natural and more suitable than in the judicial order.

The seventeenth chapter is on the power of removing judges. Without the power of deposing, the right of electing judges answers its end imperfectly. The public offices should be filled by those who possess the public confidence. An election is a declaration of confidence; but it cannot be said that the man who is esteemed to-day will always be esteemed. The popularity of the judge is a solemn and substantial good. His unpopularity is a great evil, independently of his intrinsic merit or demerit; it does not suffice to be merely just, he must also be reputed so. The causes which weaken confidence are often those to which it would be impossible to apply any other remedy than deposition; but the simple power of deposing, acting as a preservation, can produce its effect without being put into operation. Impatience and bad humour are compatible with integrity and talent; nevertheless, they are grave faults in a judge. The power of removing judges is subject to several considerable objections. The independence of the judge is tainted.

Instead of consulting justice in his decrees, he will be disposed to seek the means of pleasing those who have the power of depriving him of office. Bentham answers this objection by observing that there is an ambiguity in the employment of the term independence. The necessary quality for a judge is probity; and this is not the result of absolute independence. There is an outcry against deposition: it destroys absolute independence. The independence of the judge, relatively to the sovereign, is favourable to probity, because it leaves him dependent on public opinion. The independence of the judge is a fine phrase when it is applied to the moral courage of a judge resisting the authority and the solicitations of power. The phrase is abused by extending it to this, that the judge is not to account for his conduct. Publicity is acknowledged as the soul of justice, and amongst other reasons, because it insures the presence of public opinion, because it acts at the same time as a support and as a check. But if independence were a thing as desirable as it is pretended, it would be necessary to place judges under the veil of mystery, and to establish secret procedure, the only true safeguard of their absolute independence. The second objection is, that the fear of an unreasonable deprivation will keep away from the function of judge men the most capable to fill it well. Such men will not take a precarious situation, in which they may be exposed to all the storms which may upset public opinion for a moment, or to the intrigues which may be formed in a representative assembly.

In the eighteenth chapter Bentham points out two corrections for the danger which may be apprehended from the power of removing the judges. The first is to render them, despite of their deprivation, immediately re-eligible either to the same place or to another—a measure which leaves to the interested party the resource of an appeal, and even of a triumph. The second correction is in the permanence of a salary. This demands due development. A deprivation without judicial proof might be the effect of error or cabal. It is thus essential

to discourage hostility and intrigue, and to counterbalance them by public interest.

The nineteenth chapter is on the establishment of a public accuser and defender. These two public offices ought to be established after the model traced out for the judges. The mode of election, the power of removing them, the power of degradation, the rule against plurality of employments, responsibility—all is common to them with some slight differences.

5. The word "evidence" originally means the state of being evident. It now strictly means any thing that tends to render evident. The word evidence considered in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. Proof is the effect of evidence. By competent evidence is meant that which the law requires as the fit and appropriate proof in the particular case, such as the production of a writing, when its contents are the subject matter of inquiry. Satisfactory, or sufficient evidence, is that amount of proof which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. In the English administration of Law, the competency and admissibility of evidence are questions to be decided by the court;—its sufficiency to be decided by the jury.

The progress of opinion is one of the most interesting subjects—it confers on history its chief value—it furnishes philosophy with its most certain guide, and although the indications of its path are various—the codes, institutions, statutes, and judicial proceedings of different countries, may, perhaps, and more especially where the people possess any thing like freedom, must be considered its authentic and binding monuments.

The Law of Evidence is one of those landmarks of civilization which it is impossible for the philosophical inquirer to overlook. It constitutes an important part of human opinion; it has fluctuated with the vicissitudes of society; it has advanced with its progress, and

declined with its degradation. In the middle ages, the sacred relics of the Saints were unable to insure the veracity of a witness. And the judge in despair called upon Providence to supply, by a special interposition, the want of human judgment and sagacity. Such was the origin of trial by ordeal and by battle. Such was the origin of the institution of compurgators, who swore not to fact, but to belief. Those barbarous ages did not venture to rely upon the simple oaths of individual witnesses to facts, although with flagrant inconsistency they gave credit to the cumulative oaths of those who knew nothing of the facts. And although the judges of such times were either too ignorant or too indolent to try the credit of witnesses by diligent examination and comparison of testimony, judicial oaths were multiplied to an absurd and profligate extent. In these ages existed the expedient of applying torture to extort confession, under which influence so many wretched creatures have confessed witchcraft, and direct intercourse with evil spirits. Law Reformers now admit that there should be no objection made to the competency of any person as a witness; —though there may be many and grave objections as to his credit: yet we are to remember how slow is the progress of improvement. In England, although the trial by battle in civil suits received a considerable check in the reign of Henry II., in consequence of the introduction of trial by the grand assize, yet the practice was continued in appeals till long afterwards, and has but very lately ceased to be the law.

No fact can be known to the intellect without evidence. L'esprit ne sait veritablement que ce qu'il voit avec evidence.[1] Courts of justice should decide according to rules which insure accuracy and impartiality of decision. In countries where trial by jury prevails, it is especially necessary that some knowledge of the principles of evidence should be different through the community. Under the English judicial system, it is incumbent upon the

[1] Malebranche, Recherche de la Verité, Liv. 3, c. 4.

party who makes a claim against another before a court of law, previously to state in writing the facts, which if true, show the claim is well founded. The defendant then by demurrer may admit the facts, and deny the legal consequences thereof contended for by the plaintiff; or by plea either deny the facts so alleged wholly or in part; or admitting the facts so alleged to be true, state others, which taken in connection with the facts already stated, show that the claim is in law unfounded. When such additional facts are pleaded in defence, the plaintiff, in his turn, may either deny some material facts so pleaded in defence, or admitting those facts to be true, either demur in law, so as to raise a mere question of law, or allege additional facts; and in like manner, so long as further facts are pleaded by the one party, the other may either deny one or more of such facts, or demur, or allege further facts. When these pleadings terminate by a direct traverse of the material facts alleged on either side, or by a demurrer in law, the parties are said to be at issue, that is, *ad exitum*, at the end of the pleadings. By the English law, questions or issues of fact thus agreed upon are tried by "the country"—that is, by a jury of twelve men indifferently chosen, a part of the great body of the community. This celebrated tribunal,—so long the boast of the English people, and the safeguard of their liberties—is now spreading its advantages through the length and breadth of the great North American Continent; and is the first demand of the oppressed nations of the European Continent, in their efforts for Reform.

The only true guide to truth is reason, aided by experience. But the experience which best assists judges to decide upon matters of fact, arising out of the concerns of society, is that experience which results from an actual knowledge of the habits and dealings of mankind; and the reasoning faculties best adapted to apply such knowledge and experience to the investigation of truth are the natural powers of vigorous minds, unincumbered and unfettered by the technical and artificial rules, by

which permanent tribunals would be apt to regulate their decisions. Lord Brougham, when Lord Chancellor of England, in directing an issue at law, thus expressed his opinion upon this subject—"I certainly retain the opinion which I always held in common with the profession, that the best tribunal for investigating contested facts, is a jury of twelve men, of various habits of thinking, of various characters of understanding, of various kinds of moral feeling, all of which circumstances enter deeply into the capacity of such individuals. A jury is, as I have more than once observed in this place, an instrument peculiarly well contrived in two cases—of assessing damages, and giving compensation in the nature of damages assessed, and guiding the way for the court, which is ultimately to decide, through a mass of conflicting testimony. The diversity of the minds of the jury, even if they are taken without any experience as jurors, their various habits of thinking and feeling, and their diversity of cast of understanding, and their discussing the matter among themselves, and the very fact of their not being lawyers, their not being professional men, and believing as men believe and act on their belief in the ordinary affairs of life, give them a capacity of aiding the court in the eliciting of truth, which no single Judge, be he ever so largely gifted with mental endowments, be he ever so learned with respect to past experience as such, can possess in dealing with either of these two matters." In early times, when the judges were appointed by the crown durante bene placito,—when courts of justice did not enjoy that publicity caused by the invention of printing and the liberty of the press, a jury composed of freeholders of the county was the truest guard of the liberties and properties of the subject.

Trial by jury is said to be going out of fashion. In the new county courts in England, in certain cases, the suitors may have jurors, if they please; but they rarely exercise their right, being satisfied with the wisdom and integrity of the judges. Still, in such cases as libel,

slander or assault, and in all criminal cases, it is plain trial by jury will long continue.

The best metaphysicians agree in tracing all our ideas to the source either of sensation or reflection. Reflection, or as it is termed by some, the internal sense, is the intuitive perception of our own existence, and of what is actually passing in our own minds. This is the clearest of all the forms of knowledge. "Cogito ergo sum," says Descartes; and Locke again says—"If I doubt all other things, that very doubt makes me perceive my own existence, and will not suffer me to doubt of that." "The sceptics," says Sir Thomas Browne, "who affirmed that they knew nothing; even in that opinion confuted themselves, and thought they knew more than all the world besides." Sensation is the faculty whereby the perception of the presence of external objects is conveyed to the mind through an outward sense. And all our ideas are formed from sensation by the operations of reflection and reason. With regard to intensity of perception, the faculties of the human mind are comprehended in the genera knowledge and judgment. Knowledge is the actual perception of the agreement or disagreement of any of our ideas; and it is only to such a perception that the term is properly applicable. Knowledge is either intuitive, demonstrative, or sensitive; it is intuitive when this agreement or disagreement is perceived immediately by comparison of the ideas themselves; demonstrative, when it is only perceived mediately, that is, when it is deduced from a comparison of our ideas with intervening ideas which have a constant and immutable connexion with them—as in the case of mathematical truths; and it is sensitive, when through the agency of our senses we obtain a perception of the existence of external objects. Judgment is inferior to knowledge in respect of intensity of persuasion, but in relation to evidence demands our attention more. Judgment is the faculty by which our minds take ideas to agree or disagree, propositions or facts to be true or false, by the aid of intervening ideas, whose connexion with them is

either not constant and immutable, or is not perceived to be so. The foundation of judgment is the probability or likelihood of that agreement or disagreement—that truth or falsehood—deduced or formed from its conformity or repugnancy to our knowledge, observation, or experience. In the affairs of life, actual knowledge and certainty extend but a very little way. Men are compelled to resort to judgment, and act on probability in by far the greater number of their speculations, as well as in the transactions of life, both ordinary and extraordinary, trivial and important. The faculty of judgment is conversant, not only about matters of fact, which falling under the observation of our senses are capable of being proved by human testimony, but also about the operations of nature, and other things beyond the discovery of our senses, and thus embraces the enormous class of subjects investigated by *analogy* and *induction*. Locke has pointed out another great distinction between knowledge and judgment. The former is reducible to three kinds; but to classify the intensity of persuasion resulting from judgment is absolutely beyond human power; for the extent to which facts or propositions may be in conformity with our antecedent knowledge, observation, or experience, necessarily varies ad infinitum. An attempt has been made to express some of the shades of judgment by the terms assurance, confidence, belief, conjecture.

Proof properly means any thing which serves either immediately or mediately to convince the mind of the truth or falsehood of a statement or proposition; and as truths differ the proofs adapted to them differ also. The word evidence signifies in its original sense the state of being evident, *i.e.*, plain, apparent, or notorious. From this it has come to mean that which tends to render evident. And evidence as a legal term is now applied to every matter of fact, the design, tendency, or effect of which is to produce in the mind a persuasion, affirmative or disaffirmative of some other matter of fact. The fact sought to be proved is termed "the principal fact." The

fact which tends to establish it is "the evidentiary fact." Proof being effected by facts brought forward in evidence, there are some divisions of facts connected generally with Jurisprudence, and which it is important to bear in mind. Bentham has in the first place divided facts into physical and psychological. By physical facts he means those facts which have their seat in some inanimate being, or if they exist in an animate being, then not by virtue of those qualities which constitute it such. Psychological facts are those which have their seat in an animate being by virtue of those qualities by which it is constituted animate. Thus the existence of visible objects and the ordinary res gestæ of a suit, range themselves under the former class. But psychological facts are only such as exist in the mind of an individual; as for instance the sensations or recollections as to which he is answering, his intellectual assent to any proposition, the desires or passions by which he is agitated, his animus or intention in doing particular acts. Psychological facts are incapable of direct proof by eye-witnesses. Their existence can only be ascertained either by confession of the party whose mind is their seat, on the principle "index animi sermo," or by presumptive inference from circumstances.

Another division of facts is into events and states of things. By an event is meant some change in the relations of things, considered as having happened either in the course of nature or through the agency of human will, in which latter case it is called an act or an action.

The remaining division of facts is into positive and negative. The existence of a certain state of things is a positive fact, the non-existence of it is a negative fact; but the only really existing facts are positive ones, for a negative fact is nothing more than the non-existence of a positive fact; and the non-existence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact.

The enunciation of truth and the eloignment of wilful falsehood are supported by three sanctions: the natural sanction, the moral or popular sanction, and the religious

sanction. The natural sanction for the veracity of witnesses is to be found in a certain powerful feeling in the human mind which impels man to speak the truth, and makes him do violence to himself whenever he betrays it. But the True and the Just are two poles towards which the human mind continually points when uncorrupted.

The moral or popular sanction derives its force from the value which men set on the opinion of others. Men have found the advantages of truth and the inconveniences of falsehood in their mutual intercourse, and actuated by the reflection that truth is in conformity with the will of God and the laws of nature, have affixed the brand of disgrace to voluntary departure from it. Hence follows, as it is observed by several authorities, the infamy attached to the word liar.

Lastly, there is the religious sanction, which is founded on the belief that truth is acceptable and falsehood abhorrent to God, and that he will reward the one and punish the other. On this principle is founded the rule of "incapacity of witnesses from want of religious belief." In our courts of justice a witness who does not believe in a future state of rewards and punishments is incompetent to be sworn.

The credit due to human testimony depends partly upon the means which the witness has had of being acquainted with what he narrates, and partly upon his intention to narrate it truly. In considering the latter of these there are three things to be attended to—first, whether the witness labours under any interest or bias which may sway him to pervert the truth—secondly, his veracity on former occasions—thirdly, his manner and deportment in delivering his testimony. "The demeanour of a witness," says Mr. Starkie, "and the manner of giving his evidence, is oftentimes not less material than the testimony itself. An overpowered and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his sternness in denouncing, his evasive replies, his affec-

tation of not hearing or not understanding the question, for the purpose of getting time to consider the effect of his answer; precipitancy in answering without waiting to hear or understand the question; his inability to detect any circumstance wherein, if his testimony were untrue, he would be open to contradiction, or his forwardness in minutely detailing those, where he knows contradiction to be impossible, an affectation of indifference—are all, to greater or less extent, obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions, without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction, if his testimony is false, are, as well as numerous others of a similar nature, strong indications of his sincerity."

The capacity of a party to give a faithful account depends on the opportunities which he had of witnessing what he describes, and his power, either natural or acquired, of perception and observation; next, whether the circumstances which he relates were likely to attract his attention in consequence of their importance either intrinsically or with relation to himself; and, lastly, his memory; and here whether the transaction is ancient or recent, whether his recollection has been refreshed by memoranda or conversation. There are two things which must never be lost sight of when weighing testimony of any kind—the consistency of the different parts of the narrative—the possibility and probability of the matters related. The term direct evidence is applied to cases where the principal fact is attested directly by witnesses or documents. The term circumstantial evidence is used where the principal fact follows by inference from the evidentiary facts. Judicial evidence is the evidence received by courts of justice in proof or disproof of facts, the existence of which comes in question before them.

The great merits of Bentham's work on Evidence had their effect upon the reform of the English law of Procedure. When Bentham wrote all witnesses who had an interest in the result of the suit were disqualified from

giving any testimony. A series of enactments in England has removed the objections to the competency of interested witnesses. Finally, in complete accordance with the views of Bentham, plaintiffs and defendants are competent and compellable witnesses in almost all civil actions.

CHAPTER IV.

SAVIGNY.

WORKS:—The Mission of our Age in Jurisprudence and Legislation, 1814. History of the Roman Law in the Middle Ages, 6 vols., Heidelberg, 1815–1831. System of the Modern Roman Law, 8 vols., Berlin, 1840–1849. The Law of Obligations, 1851–1853.

There are two modern schools of Law—the analytical and the historical. At the head of the former stand Bentham and Kant, of the latter Hugo and Savigny. But it is the business of science to unite these schools, as law ought to be a compromise between history and philosophy. Germany latest of the European nations acquired a national literature. Klopstock, Lessing, Schiller, and Goethe finally brought their country to rival the literary glories of France and England. Jurisprudence received an impulse from literature. To Heineccius and Bach succeeded original German authors, and the era of the historical school arrived. In reality, Vico and Montesquieu were the founders of the historical school. They had attempted to trace the history of humanity as the history of one man who had lived through all the ages, and continually learned something. The historical and national spirit had commenced in Germany to make a resistance against the French philosophy which designed to improvise legislation in the Prussian code. Justus Moeser and Johannes Schlosser contended in favour of the German laws and manners. They were the precursors of the German historical school. About the year 1790 Gustaf Hugo,[1] a Professor at the

[1] Gustaf Hugo. Encyclopædia, 6th ed., 1823. History of Roman Law to the time of Justinian, 10th ed., 1826. Literary History of Law since Justinian, 2nd ed., 1818. Course of Natural Law, 4th ed., 1819.

University of Gottingen, undertook to reform the study of Jurisprudence. By his courses of lectures, by the publication of periodical works and elementary books, he changed the system of university education. Cramer and Haubold were joined to Hugo in his works of reform. Haubold wrote in Latin, and was the classic of this literary revolution. He illustrated the Roman law by philosophy and bibliography.

In 1814, on the expulsion of the French from Germany, many questions remained unsettled in law and politics. Amongst others the question of one uniform code of law for all Germany was vehemently discussed. Thibaut, Professor at the University of Heidelberg, wrote on the necessity existing for such a code—Uber die Nothwendigkeit eines allgemeinen burgerlichen Rechts für Deutschland. Germany is free, he wrote. It is for good citizens, good Germans, to unite, in order to make all that remains of the French spirit disappear. Political unity and power in the hand of one would be fatal to Germany. But uniformity of civil legislation would save Germany from the anarchy with which Germany is threatened. The German Law and the Canon Law are at once confused and incomplete. The Roman Law will never be entirely known. Besides, there is an antipathy between the Roman and the German mind. There ought, then, to be a new uniform code. Academic education would then acquire unity. And in this fashion would be effected the union between theory and practice. The administration of justice would no longer have any thing arbitrary in it. The national character disembarrassed of local minutiæ would become more free and enlarged. It might be argued that law is eminently variable, that it depends on places and times. But far from that, law is made to triumph over the habits and inclinations of men, to correct societies, and influence them. There is required, then, said Thibaut, for Germany a common code, which, culling from the lessons of the past, gathering the riches and the progress of science, would give to the country an uniform system of justice, leaving to erudi-

tion complete independence. But the jurists, with whom the love of antiquity and of national customs was a doctrine, were repugnant to the required innovations. And Savigny at their head successfully declared against a general code for Germany.

I now proceed to the consideration of this jurist, who, though taking no prominent part in affairs either as a statesman or a politician, yet has well discharged the debt which every man owes to his profession, and whose works on historical Jurisprudence are the best which the age has produced.

Friedrich Karl von Savigny, the most distinguished jurist of the nineteenth century, was born at Frankfort-on-the-Mayne, in 1779. After a course of study at Marbourg, he became, in 1808, Professor of Law at Landshut, and was one of the first professors appointed to the new University of Berlin, in 1810. Since that time he has lived in Berlin in a long career of public service. This, however, did not interrupt the series of juridical works which the legal world owes to his laborious pen. In 1817 he became member of the Council of State of Prussia; in 1819 member of the Committee of Revision of the Provinces of the Rhine; in 1842 Minister of State and Minister of Justice of the Kingdom of Prussia. Since the political disturbances of 1848 he has ceased to take a part in public affairs. His legal works have placed Savigny at the head of the historical school of law, formerly represented by Schlosser and Hugo.

I shall now proceed to give an analysis of those portions of the "System of the modern Roman Law" which intimately relate to the science of Jurisprudence. When a domain of science such as law has been cultivated by the uninterrupted exertions of many ages, it offers to the present generation a rich inheritance. It is not merely the mass of achieved truths which have descended to us, but every attempted direction of intellectual powers, all the endeavours of the past, whether they have been fruitful or failures, avail us as guides or warnings, and thus we are enabled to labour with the united strength of the centuries that are gone. To abandon those advan-

tages of our position is to repudiate the most precious inheritance of science, the community of scientific convictions, and that continued living progress, without which that community would degenerate into a dead letter,—die Gemeinschaftlichkeit wissenschaftlicher Uberzeugungen, und daneben den steten lebendigen Fortschritt, ohne welchen jene Gemeinschaft in einen todten Buchstaben übergehen könnte.[1]

But hence arise to us peculiar and great dangers. In the mass of ideas, rules, and technical expressions which we derive from our predecessors, there must unfailingly be mingled with the truths achieved a great mass of error, which by the traditional power of an ancient possession can easily obtain authority over us. To avoid this danger we must desire that from time to time the entire mass of what has been handed down to us should be proved anew, questioned, and investigated as to its origin. Thus, from entirely opposite points of view, we arrive at one and the same requirement in our science. It is necessary for us to make a periodical revision of the labours of our predecessors in order to separate the ungenuine, and to appropriate the truth as an abiding possession,—all which places us in the position of approaching according to the measure of our strength nearer to the goal in the solution of the common problem. And to originate such an examination in reference to the present epoch is the end of Savigny's work.[2]

Savigny at the outset does not dissemble his apprehensions lest the unprejudicial reception of the work might be endangered through what has happened in very recent times in the science of law. Many at the very name of the author would be disposed to think that the work was not designed for the free service of the science, but for the onesided advocacy of the historical school. And the work is thus made to bear the character of a party-writing, against which every one who does not belong to that school ought to be on his guard.

All success in the science of law rests upon the co-

[1] System des heutigen Römischen Rechts. 8 vols., 8vo.: Berlin, 1840. Preface, p. 10.

[2] Ib. p. 12.

operation of different intellectual activities—Geistesthätigkeiten. To designate one of those in its individuality, and in the scientific direction pre-eminently springing from it, the expression of the historical school was used by Savigny and others without any intention of giving offence. This side of the science was held forth conspicuously, not to destroy or even to lessen the value of other activities or directions of study, but because this faculty for a long time had been neglected, and therefore required a zealous support in order that it might be restored to its natural right. To that denomination is now attached a long and animated controversy. In late times many hard words have been spoken. A defence against such an attack would be useless—perhaps impossible; for as the ill-humour has proceeded more from personal feelings than from scientific objections, the adversaries of the historical school accustom themselves to put together and condemn under that name whatever is unsuitable or disagreeable in literary exhibitions. Who would confute such criticism? One reproach, however, must be excepted on account of its general nature. It has been often maintained by their adversaries, that the members of the historical school, forgetting their independence, wished to extol the authority of the Past,—in particular, that they desired to extend the authority of the Roman law, in opposition partly to the German law, partly to the new institutions of law, which through Science and Practice may have come into the place of the pure Roman law. Savigny considers that this reproach has a universal scientific character, and ought not to be passed over in silence.[1]

The historical view of the science of law is quite misunderstood and disfigured, when it is so frequently asserted that in it the formation of law proceeding from the Past is set up as the highest type, which must exercise immutable dominion over the Present and Future. Much rather does its essence consist in the equal appreciation of the merit and independence of every age, and

[1] Preface, p. 14.

it only places the highest importance in this, that the living connexion may be acknowledged which binds the Present to the Past, and without the knowledge of which we perceive only the external appearance of the state of the law of the present age without comprehending its internal essence. In its particular application to the Roman law, the historical school does not, as has been asserted by many, proceed to assign to it an undue authority; it rather wishes to find out and establish what in the whole body of our law is of Roman origin, in order that we may not be controlled by it unconsciously; but then it strives in the circle of the Roman elements of our consciousness of law—Rechtsbewustseyn —to separate that part of them which has in fact become dead and extinct, and only preserves a disturbing apparent life by means of our misunderstanding, in order that for the development and wholesome influence of the still living part of those Roman elements a freer space may be gained.[1]

Savigny then throws out the hope that with the unprejudiced this declaration may serve absolutely to put an end to the whole party quarrel and the party names referring to it, especially as the grounds which occasioned the first use of the name of the historical school have as good as disappeared along with the predominant deficiencies, the combating of which was then necessary. Certainly a continued strife of such a description may serve for a more vigorous cultivation of many antitheses; but this advantage is far outweighed by the interruption of the unprejudiced appreciation of the efforts of others, as also that thereby those faculties are wasted in the struggle of parties which might be exerted in a more salutary way in the common prosecution of the objects of the science. Savigny is far from denying the great advantage of scientific controversies in general. They are a condition of the life of science. And in the kind and direction of the intellectual powers of individuals a great difference may constantly be observed. But from

[1] Preface, p. 15.

the co-operation of elements so opposite will arise the true life of the science, and the possessors of the different faculties should never cease to consider themselves as labourers at the same great building,—Gerade aus dem Zusammenwirken so entgegengesetzter Elemente soll aber das wahre Leben der Wissenschaft hervorgehen und die Träger der verschiedenen Kräfte sollen nie aufhören, sich als Arbeiter an demselben grossen Bau anzusehen.[1]

The intellectual activity of individuals in reference to law may manifest itself in two different directions, either through the acceptation and development of the consciousness of law in universals, therefore by knowing and teaching, or through its application to the events of real life. This twofold element of law, the theoretical and the practical, is founded upon the universal essence of law itself. In the development of recent times these two directions have divaricated in different positions and professions. Thus those who cultivate law with few exceptions make either Theory or Practice their exclusive profession. As this does not arise from arbitrary will, so there is in it nothing to praise or blame. But it is very important to consider with earnestness what in this opposition is natural and wholesome, and what may degenerate into fatal onesidedness,—Einseitigkeit. All advantage rests upon this, that in these special activities every one should keep before his eyes the original unity, that the Theoretician should cultivate the Practical, and the Practician should cultivate the Theoretical. Where this is not done, where the separation between Theory and Practice becomes absolute, there is the unavoidable danger that Theory may end in an empty game, Practice in a purely mechanical trade.[2]

Since the principal evil in the existing position of law consists in the ever increasing separation between Theory and Practice, the remedy can be found only in the re-establishment of their natural unity. The Roman law rightly studied can afford the greatest aid to this. With

[1] Preface, p. 17. [2] Ib. p. 20.

the Roman jurists that natural unity is displayed yet undisturbed, and in living realization. This is not their own merit, as the present entirely opposite position of law has resulted more through the universal development than the fault of individuals.[1]

The first book is on the sources of the modern Roman Law. Its first chapter explains the object of the work. Having the Roman Law for its object, this work must apply itself to those principles of law which have a Roman origin, nevertheless including its further progress, but exclude those which have a German origin. Having the modern Roman Law for its object, it must exclude, first, the history of the Law properly so called; next, the early portion of the Roman law foreign to the Justinianean code; thirdly, that portion which belongs to the Justinianean code, but has disappeared from the German Law. Private Right,—Privatrecht, is the object, not public Right,—öffentliche Recht. The object is that which the Romans termed jus civile in one of the many significations of the term, or that which in the time of the Republic was the separate knowledge of the jurisconsultus, or jurisprudentia. Savigny observes in a note on this passage, that Cicero designates himself as the opposite of a jurisconsult, but he was very far from thinking that he or any other statesman knew less than a jurisconsult of the constitution, or the jus sacrum etc. Ulpian gives the term jurisprudentia a much wider signification. But there is no want of precision in his definition, and yet less an excessive exaggeration of his science, especially as there was in his time an altered position of the jurisconsult and the statesman.

Finally, the object is the system of the Law itself, to the exclusion of procedure, or what is termed by some, the formal prosecution of Law,—Rechtsverfolgung. This is what some have termed material private Law.

The second chapter is on the general nature of the sources of Right. We must seek the foundations of the Roman Law in the sources of Right. If we consider the

[1] Preface, p. 25.

position of Right, as it encircles on all sides, and penetrates us in real life, it appears to us as the power of an individual; a territory in which his will reigns, and reigns with our consent. This power we call a Right, synonymous with faculty; and some call it Right in the subjective sense. Such a right manifests itself pre-eminently in a visible fashion, when it is doubted or attacked, and the judicial authority recognises its existence and extent. But a more attentive examination convinces us that this logical form of a judgment pertains to an accidental want, and that the essence of the matter is not exhausted; on the contrary, that a deeper foundation is necessary. This we find in the juridical relation,—Rechtsverhältniss, to which every individual right considered abstractedly presents a different side; for a judgment upon an individual right can be neither true nor reasonable, unless it displays a complete view of the relation of law. This relation of law has an organic nature; and this manifests itself partly in the connexion of its elements which mutually balance and limit each other, partly by the progressive development which we observe in its origin and decline. This living construction of the relation of Law in every individual case, is the intellectual element in the practice of a lawyer, and distinguishes his noble profession from the mere mechanical pursuit, which so many ignorant persons see in it. Diese lebendige Construction des Rechtsverhältnisses in jedem gegebenem Fall ist das geistige Element der Juristichen Praxis, und unterscheidet ihren edlen Beruf von dem blossen Mechanismus, den so viele unkundige darin sehen.[1]

A judgment upon a particular right is only possible by referring the matter of fact to a general rule by which the individual rights are governed. This rule we simply term the Right; many call it right in the objective sense. It appears in a visible form especially in the enactment which is a declaration of the highest power in the state upon the rule of Right. But as the judgment upon a

[1] B. 1. c. 2, s. 4.

single disputed point of right has a limited and dependent nature, and first finds its living root and its convincing power in the intention of the juridical relation, —Rechtsverhältniss, the same relation exists with reference to the rule of Right. For the rule of Right, as well as the expression of it in the statute, has its deeper foundation in the intention of the principles of Right. And its organic nature is also manifested both in the living connexion of its component parts, and in its progressive development.

On further observation we perceive that all the principles of right are bound in one system, and it is only in the vast whole of this system, in which this same organic nature appears, that we can completely understand it. However immense may be the distance between a limited juridical relation, and the system of the Positive Law of a nation, still the difference lies only in the dimensions; in their essence they are not different; and the proceeding of the mind, which leads to the knowledge of both of them, is essentially the same. Hence it follows how erroneous it is when in the science of Law very frequently Theory and Practice are viewed as wholly separate, nay, even as opposed. The external profession in life is different in them; the application of the acquired knowledge of law is different in them; but the mode and true direction of thought, the cultivation which leads to them they have in common; and one or other vocation will be worthily discharged by him only who has a thorough consciousness of their identity:—die Art und Richtung des Denkens, so wie die Bildung, die dahin führt, haben sie gemein, und es wird das eine und das andere dieser Geschäfte nur von Demjenigen würdig vollbracht werden, welchem das Bewustseyn jener Identität inwohnt.[1]

The sources of Right,—Rechtsquellen, comprise the fundamental origins of general law, and consequently the institutes of Law, as well as the individual rules drawn from it by abstraction. Every individual juridical

[1] Ib. s. 5, p. 11.

relation,—Rechtsverhältniss, has its fundamental basis. And the affinity of the juridical relations with the institutes of law, easily proceeds to a confounding of them with the fundamental origins of the rules of Law. Were we fully to examine the conditions of a juridical relation, there will infallibly be found therein a rule of right, and a fact corresponding to that rule; for example, a law which recognises a contract and the contract itself. Yet both those conditions are specifically different, and a confusion of ideas ensues when contracts and laws are placed on the same line as sources of Right. Another mistake, arising through the name, is the confounding of the sources of Right with the historical sources of the Science of Right. To these belong all the monuments from which we derive the knowledge of facts relative to the Science of Right. Both these ideas are therefore entirely independent of one another, and it is only by chance when they meet on the same point, although this coincidence is frequent and important. Thus, for example, Justinian's Digests serve for sources in both significations of the term: the Lex Voconia belongs to the sources of the more ancient law, but since it is lost it does not belong to the sources of the Science of Right. In the passages of the historians and of the poets, which contain ideas of law, the reverse occurs, and they belong exclusively to the historical sources.[1] Here it might be supposed that Right has an origin entirely different according to the influence of chance, or through human choice, deliberation, and wisdom. But this supposition is contradicted by the incontestable fact, that everywhere, whenever a juridical relation comes to a question and to consciousness, a rule for the same has long existed, so that now for the first time to discover it, is neither necessary nor possible. In reference to this nature of universal Right, according to which in every given state in which it can be investigated it has a given real existence; we call it Positive Right,—positives Recht.[2]

If we inquire further as to the subject in which and

[1] S. 6, vol. 1, p. 13. [2] S. 7, vol. 1, p. 14.

for which Positive Right has its existence, we find this subject is the People. Positive Right lives in the common consciousness of the People, and we have therefore to call it the People's Right,—Volksrecht. But we must by no means imagine that this was established through the will of individual members of the people: for this will of individuals might, perhaps, have chosen the same law, but, perhaps, and more likely, one entirely different and multifarious. It is rather the common mind of the people living and working in individuals that produces the positive law, which according to the consciousness of each individual is not accidentally but necessarily one and the same law.—Vielmehr ist es der in allen Einzelnen gemeinschaftlich lebende und wirkende Volksgeist, der das positive Recht erzeugt, das also für das Bewustseyn jedes Einzelnen nicht zufällig sondern nothwendig ein und dasselbe Recht ist.[1]

Since then we assume an invisible origin for the positive law, we must therefore abandon every documentary proof. But this defect is common to our theory of that origin, along with every other theory: for among all nations which have entered into the limits of documentary history, we find a positive law already existing, of which the original production lies likewise beyond historical limits. But there is no want of proofs of another kind, such as are consistent with the special nature of the subject. Such a proof lies in the general uniform recognition of Positive Law, and in the inward feeling of necessity with which the idea of it,—Vorstellung,—is accompanied. This feeling expresses itself in the most decided manner in the very ancient belief of the divine origin of Right or Law; for we cannot imagine that it can have arisen from chance or the arbitrary will of man. A second proof lies in the analogy of other characteristics of nations, which have an origin equally invisible, and extending back beyond documentary history; for example, the usages of social life, and especially language. In these is found the same independence of chance, or of the free

[1] Ib. p. 14.

will of individuals. In such things there is the same development from the activity of the spirit of the people operating upon all individuals. In social usages and in language from their palpable nature all this is more visible and more easily recognised than in the case of Law. Nay, the individual nature of particular nations is purely determined and distinguished by means of these common directions and activities,—Thatigkeiten,—amongst which language takes the first place as the most apparent.

This exposition of the origin of Positive Law has been without regard to the progressive life of nations. Now if we consider the operation of this upon law, we must admit it to possess a strengthening power; the longer the convictions of Right live in the people, the deeper will they take root in them. Further, Right develops itself through practice, and what originally existed in the germ, comes through application into a more complete form and consciousness. But an alteration in the Law will take place thus. As in the life of individual men no moment of complete stillness is experienced, but a constant organic development, such also is the case with the life of nations, and in every individual element in which this collective life consists. So we find in language a constant formation and development, and in the same way in law.—Denn wie in dem Leben des einzelnen Menschen kein Augenblick eines vollkommen Stillstandes wahrgenommen wird, sondern stete organische Entwicklung, so verhält es sich auch in dem Leben der Völker, und in jedem einzelnen Element, woraus dieses Gesammtleben besteht. So finden wir in der Sprache stete Fortbildung und Entwicklung, und auf gleiche Weise in dem Recht.[1]

And this formation rests under the same law of production from inward force and necessity independent of chance and individual will as the original commencement. But the people experience in this natural process of development not merely a change, but also a determinate regular succession of conditions; and in these

[1] P. 17.

conditions each person has an individual relation to the particular manifestation of the spirit of the people, through which the law is produced. This shows freest and strongest in the youth of nations, in which the national coherence,—Nationalzusammenhang,—is more internal, the consciousness of it more generally extended, and less concealed through the difference in individual cultivation. But in the same measure in which the improvement of individuals becomes more unequal, dissimilar, and predominant, and in which a more distinct separation of occupations of knowledge, and of the ranks thereby created takes place, the production of law also which rested upon the community of consciousness becomes more difficult; nay, it would finally almost entirely disappear, if for that purpose, through the influence of the same new condition, the proper organs were not again formed, namely, Legislation, and the Science of Law. This formation of Law may besides have a wholly different relation to the originally pre-existing law. There may, through it, be produced new legal institutions, or those previously existing may be modified; nay, through it the latter may entirely disappear, if they have become estranged from the sense and requirements of the age.[1]

If we in the treatment of the juridical relation abstract it from every particular substance, there remains to us as the general nature of it, the regular association of a number of men in a particular way. But there is very little difference between the abstract idea of a plurality of men generally living together, and the consideration of law as their invention without which the external freedom of no individual could subsist. In fact we find everywhere, where men live together, and so far as history gives us information, they live in intellectual community, which manifests, establishes, and improves itself through the medium of the same language.

But if we consider the people as a natural unity and in so far as the conductor of positive law, we must not

[1] S. 7, p. 18.

therefore consider this as merely existing amongst co-temporary individuals. On the contrary, this unity proceeds through generations succeeding one another; it unites also the present with the past and future. This constant maintenance of the law is effected through Tradition. And this is limited and founded, through the not sudden but gradual change of generations. The here asserted independence of law upon the life of the present members of the community, tends to the unaltered duration of the rules of Law; but it is also the basis of the gradual formation and improvement of the Law, and in this respect we must ascribe to it a pre-eminent importance.[1]

This view, which recognises the individual People as the producer and conductor of the positive or actual law, may appear too confined to many, who might be inclined to ascribe that production, rather to the human mind generally than to the individual spirit of the People. But on a more careful examination the two views do not appear to be contradictory—what operates in the individual people is merely the general human mind which exhibits itself in it in individual ways. But the creation of law is an act and an act done in common. This is only conceivable for those amongst whom a community of thoughts and actions is not only possible but likewise actual. Now since such a community previously exists, only within the boundaries of the particular people, so it is only here that the actual law can be produced; though in the production of it a general human instinct is to be observed. And the Romans gave to these general and common fundamental principles of the law of a people the appellation of Jus Gentium.[2]

The people, to which as an invisible natural whole we must attribute undefined limits, yet exists nowhere and at no time in this abstract state. On the contrary, there rather operates in it an irresistible impulse to manifest the invisible unity in visible and organic appearance.

[1] S. 8, p. 20. [2] S. 8, p. 21.

This corporeal form of the intellectual community of the people is the state.—Diese leibliche Gestalt der geistigen Volksgemeinschaft ist der Staat. The production of the state is a mode of production of Law. Nay, it is the highest step of the production of Law. Savigny accordingly divides law into constitutional or public,—Staatsrecht,—and private law,—Privatrecht. The first has for its object the state, that is the organic manifestation of the people; the second has for its object the juridical relations which encircle the individual man, in order that by them he may conduct his inward life, and fashion it into a definite form. Notwithstanding some points of affinity there remains between these two domains of law a firmly established difference, that in the Public Law the whole appears as the end, the individual as subordinate; but in Private Law the individual man is the end, and every juridical relation is regarded merely as means for his existence, or his particular benefit.[1]

The state has, however, a most multifarious influence on private law, and, indeed, in the first instance, to the realization of its existence. For in it the people first acquires a true personality and the capacity of acting. If we could ascribe to Private Law whilst out of the state only an invisible existence in harmonious feelings, views, and manners, it obtains in the state life and activity through the establishment of the juridical power.

The Law has its existence in the common spirit of the people, and consequently in the united will which in so far is the will of each individual. But the individual may by means of his freedom, through that which he wills for himself act contrary to that which he thinks and wills as a member of the whole. This contradiction is injustice or a violation of law,—das Unrecht oder die Rechtsverlessung,—which must be annihilated if law is to exist and govern. But that this annihilation may not be dependent on chance, and that a well regulated security may be maintained, the interposition of the state is indispensable. For here alone can the rules of law be

[1] S. 9, p. 23.

opposed to the individual as something exterior and objective; and in this new relation, the freedom of the individual who is capable of a violation of law appears bound by and absorbed in the united will.

But the state has also a decided influence upon the formation of Private Law, not merely in its substance, but also in the limits of the production of law, inasmuch as the community of the people is more intimately connected, and more active in the same state. On the contrary, in different states, even in the case of the same descent, it is less connected.

In order to obviate any objection of incompleteness to this classification of the laws established in the interior of a state, a certain supplement is necessary,—nay, Theory generally should not strive to limit the freedom of individual development through the proposition of any exclusive object for the activity of the state. Nevertheless, it is its first and most indisputable duty to make the idea of law prevalent in the external world. To this a twofold activity of the state is conducive. First it has to provide for the individual, whose right has been violated, protection against this violation; and Savigny designates by the term Civil Process—Civil prozess—the rules under which this activity is manifested; secondly, it has to protect and restore the right without regard to the individual interest. This is accomplished through punishments, in which the human will, in the more limited domain of law, imitates the settled rule of moral retribution in a higher sphere of the world. The rules under which this activity takes place Savigny terms criminal law—Criminalrecht—of which the Criminal process—Criminal prozess—forms a part.[1]

The preceding theory of the origin and nature of the state does not meet universal recognition. In the first place, the indeterminate idea of a multitude of men, generally abstracted from the national unity is frequently supposed to be the State. This opinion is contradicted by the universal facts, that in all times nations—Völker—have

[1] B. i. c. 11, s. 9, p. 26.

assumed the organic form of states; and that wherever the attempt has been made, arbitrarily, to bring together, on a large scale, large masses of men, without regard to the fundamental differences of origin, the result has been unfortunate.[1]

Savigny adduces as his illustration of this principle the slave states of America. And certainly the great obstacle to the emancipation of the slaves is the radical difference and total want of sympathy between them and their masters. This can only be removed by time and by gradual change of the laws regulating the slave's condition. The first change that ought to be made, following the great historical examples, is the annexation of the slaves to the estates upon which they are born. Such an alteration in the law would prevent the separation of families, give more facilities for kindly intercourse between the slaves and masters, give the slaves opportunities for the acquisition and preservation of property, and attachment to their place of birth. And all these changes would lead gradually to that fusion of sentiment essential to the unity of a nation.

There is another opinion prevailing extensively, which Savigny now proceeds to refute, namely, that States may have been formed through the arbitrary will of individuals, or through compact. It is thereby assumed, that the individuals who have found it advantageous to establish this individual state might have equally remained without a state, mingled themselves with another state, or finally have chosen another constitution. In this theory there is not only overlooked the natural unity inherent in the people, as well as the internal necessity, but also in particular the circumstance, that wherever such an idea is possible an actual state already exists both in fact and law; so that there never can be a question regarding the voluntary invention of the state, but, at most, only regarding its destruction.

Two misunderstandings have especially contributed to this error: first, the observation of the great variety in

[1] S. 10, p. 28.

the formation of states, namely, in the historical and individual elements of states; and this variety has been confounded with the free will and choice of individuals; next, the constant, though often unperceived, confounding of the entirely different ideas, which are designated by the common term people. This term designates—

First, the natural whole in which actually the state originates and maintains a continued existence, and in which there can be no question of will or choice,—das Naturganze, in welchem wirklich der Staat ensteht und fortwährend sein Daseyn führt, und bey welchem von Wahl und Willkühr nicht die Rede seyn kann:

Secondly, the collection of all the inhabitants living at the same time in the state:

Thirdly, the same individuals with the deduction of the government, as the governed in contradistinction to the governors:

Fourthly, in Republican states, as in Rome, that organized assemblage of individuals on whom, according to the constitution, the highest power actually rests.[1]

However, Savigny points out one true element in the theory here confuted. Accident and human will may certainly exercise an extensive influence over the formation of states; and besides the boundaries, by means of conquest or dismemberment, are often very different from the natural boundaries determined through the natural unity of the people. Inversely, a foreign element may often be completely assimilated to the state. The possibility, however, of such an assimilation has its conditions and degrees; for, as it is promoted particularly through any affinity of the new element, so it is promoted also through the internal unity of the state which receives it. But all such events, however frequently they may occur in history, are anomalies. The People, notwithstanding, remains as the natural basis of the State; and the formation through internal power, is its natural origin. If a foreign historical momentum enters into

[1] S. 10, p. 30.

this natural process of formation it may be overcome and amalgamated by the moral energy and vigour of the People: if this amalgamation do not succeed, a diseased condition must result. In this way it is manifest, that what originally was violence and injustice may gradually, through the power of attraction inherent in the legal condition, become a legitimate element in the state. But it is altogether inadmissible to represent such anomalies,—which disturb and try the moral power,—as the true origin of states.[1]

These admirable propositions of Savigny may be illustrated by many famous historical examples. The Roman and Norman elements successively disturbed the national unities of France, Spain, and England; but from the energy and vigour of the respective nations the foreign historical impulses were partly eliminated, partly absorbed into a distinct national character.

Savigny next proceeds to the consideration of international law,—Völkerrecht. If we regard the relation between peoples and states, it appears to us the same with the relation which exists between individuals thrown together by chance, without being joined through national unity. If all were well intentioned and civilized, each would apply to their accidental proximity the consciousness of Law which he possessed before in his freer state; and thus, through arbitrary will, they would arrange a position of Law more or less derived and translated. So independent states will apply to their mutual relations the law to which each has been accustomed according as it suits their convenience and interest; but no body of law is originated in this manner. However, between different nations there may exist a community of legal consciousness, like that which in the individual people creates the Positive Law. The foundation of this intellectual community rests partly in community of origin, partly in common religious convictions. We may, therefore, consider international law as Positive Law, but imperfectly so; first, on account of the incom-

[1] S. 10, p. 32.

pleteness of its visible extent; and next, because there are wanting to it the real bases of the positive law of individual nations, the power of the state, and the judicial authority.[1]

The twelfth section is on Common or Customary Law —Gewohnheitsrecht. The production of the species of Law described by Savigny as People's Law,—Volksrecht, —which is developed imperceptibly, and which cannot be referred to any external event, or to any definite period, has been recognised at all times. But the recognition of this Law has remained unfruitful chiefly from two causes; first, because too limited a position has been assigned to it, and because its nature has been understood incorrectly.

The term *Customary* has been unfortunate; for it might easily lead into the following train of reasoning: —As upon a juridical relation something must be done, as originally, it was indifferent what was done, Chance and arbitrary Will gave the decision. When the same case occurred it was more convenient to repeat the same decision than to think of a new one, and with every new repetition this proceeding appeared more convenient and natural. Thus, after some time, such a rule became law, which originally had no more claim to validity than the opposite rule. Hence,—according to such a train of reasoning,—"the fundamentary origin of this law was custom alone."[2]

But if we look to the proper basis, the true essence of every body of Positive Law, in the above view the true relation of cause and effect is directly changed. That basis has its existence, its reality, in the common consciousness of the people. This existence is invisible. Through what medium can we recognise it? We recognise it in external acts, usages, manners, customs. In the uniformity of a continued and enduring mode of action we recognise its common root quite distinct from mere chance—the belief of the People. Custom, then, is the sign of Positive Law, not its foundation—So ist

[1] S. 11, p. 33. [2] S. 12, p. 35.

also die Gewohnheit das Kennzeichen des positiven Rechts, nicht dessen Entstehungsgrund.[1]

There is, however, room for the exercise of the will in many cases, especially where the rule of law contains a number, as in the rules of prescription, and also in those rules of law which have for their object merely the external form of a legal document.

Savigny notices, that in both respects in which Practice in Law is important, both as the distinguishing sign of Positive Law and as an element co-operating in its origin, there are two classes of actions which show themselves in a pre-eminently fertile and efficacious manner, the symbolical forms of law business, and the judgments of courts formed from the people. The former give us an intuitive knowledge of the institutions of law in a whole; the latter, called forth through the opposition of contending claims, are obliged by this object to define the juridical relation within precisely determined limits.[2]

Even when the Positive Law has attained its highest certainty and precision, yet error or perverse will may seek to escape from its authority. Hence it becomes necessary to give it an external discernible existence, through the power of which every individual opinion may be controlled, and the effective combating of the unrighteous disposition made easier. The Positive Law thus embodied in language, and invested with absolute authority, is called the Statute Law,—Gesetz. And the true influence of legislation in the formation of law manifests itself in two respects; first, as a supplementary assistant to the Positive Law; secondly, as a supporter of its gradual development.[3]

In the individual details, many of which are left undetermined by custom, in the numerous determinations of time or number, in which nature has allowed a large space for the exercise of the will, the rule of law is settled promptly and certainly by proper legislation.

But the influence of legislation upon the progress of the law is still more important than upon its original

[1] S. 12, p. 35. [2] S. 12, p. 38. [3] S. 13, p. 40.

foundation. When through altered manners, views, and wants, an alteration in the existing law becomes necessary, or when in the progress of time new institutions of law become requisite, those new elements may be ingrafted upon the existing law through the same internal invisible power which originally gave birth to the law. Here the influence of legislation may be salutary—nay, indispensable. For as the former causes operate only slowly, so there necessarily arises an intervening period of uncertain law, which uncertainty is to be terminated through the enactment of a statute. Further, the different institutions of law are so linked together, that from each new law a contradiction may arise without its being observed, and inconsistency with other rules of law not requiring alteration. Hence a reconciliation becomes necessary; but this can only be accomplished with safety and certainty through reflection and personal interference. These reasons have in particular an obvious importance in the cases in which the law requiring a present alteration has been fixed by an earlier previous enactment; for as in these cases there exists in opposition the universally admitted power inherent in the written letters, the gradually operating internal improvement is thereby often wholly obstructed, often treated in an unsatisfactory manner. Finally there occur in the history of every nation periods of development and conditions which are no longer favourable to the development of law through the common consciousness of the people. Here this indispensable activity falls entirely to legislation. At no time was this last change so visible—nay, so sudden, as under Constantine, from which time forward the imperial legislative power, in a state of the highest activity, undertook exclusively the formation of law.[1]

It is in the natural development of nations that with the progressive improvement individual activities and sciences are divided, and hence form the several avocations of life. Thus the law also, originally the common

[1] S. 13, p. 43.

property of the united people, through the more extended relations of active life is so enlarged in individual details, that it can no longer be acquired through the knowledge proportionally diffused amongst the people. Then there is formed a particular class of persons skilled in the law, themselves a part of the people, the representative body in this department of knowledge. The law is in the individual consciousness of this class, a continuation and appropriate development of the people's law. From that time especially law leads a twofold life; its primitive fundamental principles still continue in the common consciousness of the people; its more exact formation, and its application to individual cases, is the particular vocation of the class of lawyers. The external forms of the activity of this class give a picture of its very gradual development. At first it appears merely in giving law-advice in the particular cases, partly in giving opinions upon the decision of a law suit, partly in giving instructions as to the correct preparation of a legal instrument. Hence their first literary attempts are generally collations of forms, mechanical directions for the accurate performance of law business. By degrees this activity becomes more intellectual and assumes the form of science. There now appear theoretical forms, expositions of the law, partly in books of manifold descriptions, partly in oral instructions. But, as practical forms the judgments of the courts are distinguished from the old popular judgments, partly through the scientific education and improvement of the members of those courts, partly through the tradition of permanent societies.[1]

There may thus be distinguished in the class of lawyers a twofold activity; one material, inasmuch as the law productive activity of the people in a great measure retires into it, and is thenceforward exercised by it as the representative of the whole; the other formal, purely scientific, inasmuch as by it the law generally, however it may have originated, is brought home to conviction and expounded in a scientific manner. In this last

[1] P. 46.

function the activity of lawyers appears dependent, as they receive their subject matter from without. Nevertheless, there arises through the scientific form given to the subject matter, which strives to uphold and complete its inherent unity, a new organic life, which developing reacts upon the subject matter itself, so that even from the science there proceeds a new mode of law-production. How important and salutary this formal reaction of the science itself upon Law is at first sight obvious. But it is not without danger. The Roman jurists remarked, omnis definitio in jure civili periculosa est.[1] And herein lies the great danger of the compilation of a complete Code,—Gesetzbuch—that the temporary form is fixed, and is withdrawn from the natural refinement by progressive scientific development.[2]

From the preceding exposition it results that originally all Positive Law is People's Law,—Volksrecht—and that legislation stands by the side of this original production of law often too in early times. Then comes through the progressive development of the people the science of law, so that in legislation and the science there are given to the People's Law two organs, of which each at the same time leads for itself its own proper life. Finally, in later times the law-forming power of the people in its totality decays, so that it then lives in those two organs. But a sound and healthy state of the law exists only where the two law-forming powers operate harmoniously together, and neither of them isolates itself from the other.[3]

This mutual connexion of legislation and the science of law with People's Law renders it necessary to examine the nature of the essence of the People's Law. In it we find a twofold element—one individual, belonging to each people in particular; the other general, founded on the common nature of man. Both find their scientific recognition and satisfaction in the history of law and the philosophy of law. Now, among those who have occupied themselves with the investigation of the nature

[1] De R. J. (50, 17). [2] S. 14, p. 48. [3] S. 15, p. 51.

of law, there are some who have treated the idea of it as something self-existent absolutely. And even those who have treated it more scientifically have still been frequently led to a one-sided treatment of the law; some because they apprehended the contents of the law as something accidental, and satisfied themselves with the ascertainment of facts as such; others by the assumption of a Normal Law,—Normalrecht,—existing above all Positive Law, which according to them all nations would do well to adopt in place of their individual positive laws. This last one-sided view deprives law of all vitality, whilst the former neglects its higher vocation.[1]

Through the recognition of the two elements of positive law—the universal and the individual, a new and loftier vocation is opened for Legislation. For it is exactly in the mutual operation of those elements on each other that the most important motive lies, of the progressive law of the people, in which every thing depends upon this knowledge and this constant approach nearer to the universal end, without weakening the energy of the individual life. In this way there is presented much to smooth down, many obstacles to overcome; and here the legislative power can afford real assistance to the invisibly working spirit of the people. But in no department is so much precaution necessary, lest one-sided opinion and caprice,—Willkühr,—stifle the living and progressive principles of law.[2]

The sixteenth and last section of the second chapter defines absolute and permissive, normal and anomalous law,—absolutes und vermittelndes, regelmässiges und anomalisches Recht. Some laws command in a necessary and invariable manner without leaving room for individual will; others leave the field open to individual will. The first was called by the Romans jus publicum, —publicum being synonymous with populicum and meaning what concerned the people.

The third chapter is on the sources of the existing Roman Law.

[1] S. 15, p. 53. [2] S. 15, p. 57.

The fourth chapter is on the interpretation of Statute Law. Savigny has hitherto considered the substance of the sources of Law as the independent rule of Right. That this rule may pass into life it is necessary that we on our part do something for that purpose, that we adopt it in a determinate manner. This adoption may lead to many different applications: in the jurist to the cultivation of the science in varied forms;—in the judge to judgments and their execution;—in the private individual to the direction of his relations of life in a determinate manner. Such a reception of Law is conceivable and necessary in all the different sources of Right. However in customary law and scientific law the business is of a more simple nature. Certainly upon the production of these species of the formation of law there occur exclusive errors. But when these are known and avoided, the intellectual operation itself does not require a detailed explanation. It is otherwise with statutes in which this operation is often of a very involved nature.

This pre-intellectual operation may be described as limited to this, that we know the statute in its truth, through the application of a well-regulated procedure. This is necessary with every statute, if it is to exert influence—Eingreifen—on life; and in this its universal necessity lies also its justification.[1]

In one case this free intellectual operation cannot take place; namely, when the meaning of a statute has become the object of a new rule of law. For as it is thus determined, either by a new statute, or by an actual customary law, how the older statute is to be understood, that free activity of the mind is entirely excluded, and the older statute must henceforth be understood and applied in the prescribed sense by those who may be perhaps convinced of the incorrectness of the interpretation. The moderns call this the authentic or usual interpretation accordingly as it rests on statute or custom; and term both the legal interpretation, which

[1] S. 32, vol. 1, p. 206.

they now oppose to the doctrinal, that is, the before-described free or scientific act.

Now if we proceed from the fundamental idea of interpretation as a free act of the mind, the so-called legal interpretation does not appear as a co-ordinate species of the same kind, but rather as a complete contrast, as the exclusion of that independent mental activity. And this definition is proved to be correct, inasmuch as the true and incontestable relation of rule and exception presents itself in the plainest manner. Savigny, therefore, uses Interpretation only in the doctrinal sense. Interpretation is an Art; and improvement in it has been promoted by the excellent models of old and recent times, which we possess in rich abundance.—Die Auslegung ist eine Kunst, und die Bildung zu derselben wird durch die trefflichen Muster aus alter und neuer Zeit, die wir in reichem Maasse besitzen, gefördert.[1]

The doctrine of the interpretation of statutes has two parts: first, the interpretation of the individual statutes considered by themselves; next, the interpretation of the circle of the sources of law as a whole. Namely, as this is required for the complete command of law, so there must be found in it as well unity as an exhaustive whole. This first postulate makes it necessary to remove contradictions, the second to supply deficiencies.

The object of a statute is to fix the nature of a juridical relation, to express any thought, whether simple or compound, by which the existence of that juridical relation is secured against error or caprice. To attain this end, those who come in contact with the juridical relation must comprehend that thought fully and completely. This ensues when they transport themselves in thought into the point of view of the legislator. So far the interpretation of the statute Law is not different from the interpretation of every other thought expressed in language, as for example is practised in Philology. But its particular element shows itself when we decompose it into its constituent parts. Thus there are in it

[1] S. 32, p. 211.

four elements, grammatical, logical, historical, and systematical. The grammatical element of Interpretation has for its object the word which procures the transition of the thought of the Legislator into our thought. The logical element proceeds upon the dismemberment of the thought, and therefore the logical relation in which its individual portions stand to one another. The historical element has for its object the condition of the rules of law existing at the time of the statute enacted for the determinal legal relation. Finally, the systematic element refers to the internal connecting link, which binds together all the institutions and rules of Law into one great unity.—Das Grammatische Element der Auslegung hat zum Gegenstand das Wort, welches den Ubergang aus dem Denken des Gesetzgebers in unser Denken vermittelt . . . . . Das Logische Element geht auf die Gliederung des Gedankens, also auf das logische Verhältniss in welchem die einzelnen Theile desselben zu einander stehen. Das Historische Element hat zum Gegenstand den zur Zeit des gegebenen Gesetzes für das vorliegende Rechtsverhältniss durch Rechtsregeln bestimmten Zustand . . . . . Das Systematische Element endlich bezieht sich auf den inneren Zusammenhang, welcher alle Rechtsinstitute und Rechtsregeln zu einer grossen Einheit verknüpft.[1]

But the success of every interpretation depends upon two conditions; and in these the four elements may be combined: first, that we in a vivid manner present to ourselves the intellectual activity, out of which the particular expression of thought has proceeded; secondly, that we have the intuition of the historically dogmatic whole, (from which alone this individual law can receive any light,) in sufficient preparation, in order to ascertain its bearings upon the text to be interpreted.

The conceivable cases of such defective statutes are as follows:—Indefinite expression, which, thus crowded, leads to no completed thought; incorrect expression, in which the thought immediately expressed is at variance

[1] C. iv. s. 33, p. 214.

with the actual thought of the law. In these cases a gradation of necessity is obvious. For the removal of the first defect is attended with as little difficulty, as simply necessary. The second demands much greater attention, and requires special caution. But before these cases are separately stated, it is necessary to weigh the remedies which may be applied in their treatment. The first remedy consists in the internal mutual connexion of the legislation; a second, in the dependent connexion of the statute with its ground; a third, in the internal value of the contents flowing from the interpretation.

The internal connexion of the legislation can be applied in two ways, as a remedy for the interpretation of defective statutes. Firstly, in so far as the defective part of a statute is cleared up by another part of the same statute, which is the safest method of interpretation; secondly, through the explanation of the defective by another statute. This last method of interpretation will be the more certain, the nearer the two statutes are allied; and most certain, if they emanate from the same legislator. Still the anterior laws may be useful in interpretation, as the author of the statute now to be interpreted may have had these anterior statutes before him, and they may have been a supplementary part of his thought. The later or posterior laws may also prove useful in interpretation; only this case seldomer occurs in the sphere of pure interpretation. For, in most cases, such later statutes stand to the defective in the relation of an alteration, or, at the very least, of an authentic interpretation, which is no longer true interpretation. Where this proceeding occurs as pure interpretation, it rests upon the supposition that the manner of thinking of the earlier legislator has been preserved in the later legislator. The ground of the statute can likewise be used as a means for the interpretation of defective statutes; yet not with such effect as the mutual connexion of the legislation. Much more its applicability is determined by the degree of certainty whereby we recognise it, and on the degree of its relationship to

the substance of the statute. If one of these obstacles stand in the way, still it may be always applied to the removal of the first kind of these defects, indefiniteness, but less to the second, incorrectness. Finally, the internal value of the result is, of all the remedies, the most attended with danger, since thereby the interpreter passes over the boundaries of his peculiar business, and enters upon the province of the lawmaker. Hence this remedy can be only applied to indefiniteness of expression, not to the comparison of the expression with the thought. Among these remedies, also, there is a like gradation, as between the defects themselves. The first is undoubtedly everywhere applicable; the second renders greater caution necessary; finally, the third can only be admitted within the most confined limits.

The indefiniteness of expression, which renders it impossible to perceive a complete thought, may be conceived in two ways, as incompleteness, or as multifariousness of signification. The incompleteness of the statutory expression has a similar character, as when a speech commenced is interrupted, so that, for the complete thought, the meaning is left undecided. This case occurs, *e.g.*, if a law should require witnesses to a transaction, without specifying the requisite number. More important is the case of multifariousness of signification, which again may occur in different forms, as multifariousness of the mere expression, or of the construction. The individual expression may concern an individual subject, and a signification required for it which may extend to several individuals—a circumstance which more frequently occurs in the transactions of law business than in statutes. But it may also have an abstract conception for its subject; and here again the ambiguity may consist in this, that the selected expression may have entirely different meanings, or a narrower and more extended signification. The multifarious signification of the construction may also render the meaning of the law doubtful; and although this occurs oftener in law business than in the statutes, still there are instances

in the latter to be found. However different the forms of the defect here stated may be, they have so much in common, that each of them prevents us from perceiving a completed thought in the law so framed. The origin of this defect may be founded in a vague thought, or in an imperfect command over expression, or possibly in both of these conditions combined. For the interpreter this origin is indifferent, since for him the necessity of the remedy is alike imperative and unavoidable, as the statute in this form is not adapted for the fixation of a rule of right. The knowledge of this necessity is also perfect, since it is obtained through a pure logical process. But it ends with clearly ascertaining the nature of the doubt in question, without solving the difficulty. For which purpose the three classes of remedies already explained may serve; and their different value comes only so far into consideration, as one class is to be preferred to the other. Thus, first, where it is possible to extinguish the indefiniteness through the mutual connexion of the legislation, every other remedy is excluded as unnecessary. In the second place, the ground of the statute is to be applied to the same purpose; and certainly where the special ground is immediately connected with the contents of the statute. Finally, the indefiniteness may be removed through the comparison of the internal value of the same contents, which, through one and the other possible explanations, is ascribed to the statute.

The second conceivable defect of a statute consists in incorrectness of expression, since this certainly, on the face of it, denotes a determinate and applicable thought, but such a one as is opposed to the true intention of the law. Cases of this nature present a much smaller variety than those of indefiniteness of expression. Their difference is shown in the logical relation of the expression to the thought, inasmuch as the former can contain more or less than the thought. In the first case, the correction of the expression is effected by an extended; in the second, by a restricted interpretation. Both solely pro-

pose to bring the expression into harmony with the actual thought.

Hitherto the inquiry has been devoted to the interpretation of individual statutes. Alone, the aggregate view of the sources of law given above, forms a complete system, adapted for the solution of every question which may possibly arise in the domain of right. To carry out this end two conditions are necessary, Unity and Universality. Herein our inquiry must not be confined to individual statutes, but every source of law must be investigated. Here, also, as in the interpretation of individual statutes, the principles of the regular treatment will be stated before the remedies of the defective condition. The legitimate treatment consists in the erection of a system of law out of the aggregate sources of law. This, in its way, is similar to the construction of individual systems of law, only that the construction in the former is comprehensive. In this vast connexion —Zusammenhang, the foundation of the law, which has been formerly considered in reference to individual statutes, preserves a weightier significance and influence, and the organic creative power of the science of law—Rechtswissenschaft, appears in the greatest extension. The complete circle of law, and particularly that portion of it which we call the Corpus Juris of Justinian, may, from this point of view, be considered as a single statute, so that the rule of interpretation of a single statute by itself becomes in a certain way thereto applicable. This analogy of the individual statutes is here of peculiar importance, the full force of which, through the extent and variety of these sources, lies under peculiar difficulties. The very defective states of this bird's-eye view, compared with the defects of individual statutes, show themselves in the two conditions previously laid down. If unity is wanting we have a contradiction to remove; if universality, a gap to fill up. Properly, both these conditions can be reduced to a single principle. For everywhere it is the establishment of unity, which we seek, negatively, through the

removal of contradictions, positively, through the filling up of gaps. The case of the internal contradiction among the individual components, has some resemblance to indefinite expression in isolated statutes. Both defects concur in this, that the information is obtained by pure logical process; that the remedy is plainly necessary; and that the remedy is to be sought elsewhere than by logical process—here through historical means. The commonest principle suggests to extinguish the contra diction, where it rests merely in appearance, and thus to seek the reconcilement of the seeming contradictions. Where this reconcilement is not possible, the following are the rules for interpretation. The contradiction can exist either within our complete circle of the sources of law, or only with reference to the same sources hypothetically introduced.

Savigny in conclusion collects those views of modern writers upon the capital points of interpretation which exercise peculiar influence upon the science of Jurisprudence. And first occurs the almost generally received opinion of interpretation as an explication of obscure statutes. Since here a fortuitous and positively defective condition of the statute is made the condition of its existence, it preserves itself the fortuitous character of a mere remedy for an evil, whence it naturally follows that it must become superfluous in the same degree as the statutes become perfect. No one will deny that for obscure statutes interpretation is important and necessary; and that in them the skill of the interpreter may show itself particularly brilliant, as also occupied essentially with the greater portion of the rules here laid down in the case of defective statutes. Yet two considerations alone make that explanation of the fundamental conception appear to us as too confined and detrimental to the whole science. First, a fundamental and exhaustive study of the diseased state is impossible, unless the consideration of the normal condition to which the former must be brought back be laid down as the basis. Secondly, there is lost to us through that meaning of the concep-

tion the noblest and most fruitful application of interpretation which consists in embracing the statutes not defective and consequently not obscure, in the wealth of their contents and the variety of their relations—a proceeding which is of so great importance, especially in the Digest. Besides, if this arbitrary opinion of interpretation, as confined to defective statutes, be compared with the other opinion, according to which the obscure statutes are regarded as raised to the domain of interpretation by Justinian, there results the strange consequence that laws ought not to be either too clear nor too obscure, in order that there may be opportunities of interpretation. Secondly, it is now fitting to consider the division of interpretation, which rules the whole domain—the division into grammatical and logical. These are not considered as elements of every interpretation which must operate everywhere together; only so that according to circumstances, sometimes the one, sometimes the other element may be more productive,—but rather as opposed and exclusive of one another. The grammatical should only proceed according to the sense of the words, the logical only according to the intention or foundation of the statute; the grammatical should be the rule, the logical should be admitted only by way of exception. In this contrast the only clearly admitted and generally received idea was that the logical interpretation is of such a nature as to assume no small liberties, and which must be carefully watched. Besides, there was embraced under this expression the greatest variety of ideas. Thus there prevailed as logical interpretation the correction of the expression according to the true thought of the law, but also the extension of the meaning according to analogy; lastly, also a third, of which more hereafter. If the exposition now given of the propositions contained in interpretation be correct and exhaustive, that division must of itself be abandoned, of which the establishment and application have rather tended to obscure than elucidate the subject. In the third place, what is the most important, there has been brought into the domain of

interpretation a treatment of the statute, which in point of fact can only be considered as an alteration thereof, and which yet has been classed under the name of logical interpretation. We have already discussed the correction of the expression through a falling back on the actual thought. Now a correction of the intended thought is sought through a falling back upon those same thoughts which the statute had been supposed to contain, namely, recourse is had to the ground of the statute; and if it is found that the same leads in its logical development to more or less than the statute contains, this is amended through a new kind of expanding or restricting interpretation. Here it is indifferent whether the legislator has consciously committed a logical error, or has only omitted to dwell upon the consequent explanations of the ground whereby he is now corrected; in which last case it may be taken for granted that he would have avoided these errors had his attention been directed to the consequences. Thus this experiment appears to have been completely carried out. It has been carried out with the modification that indeed an extension according to the ground of the statute may take place, but never a restriction; a convincing reason for which could with difficulty be assigned.

Two elements enter into every legal relation; first, a matter of fact, that is to say, the relation itself; secondly, the legal determination of that matter of fact. The first we can designate as the material element of the legal relation, or as the mere matter of fact in it; the second as its formal element, or that which is the same, whereby the matter of fact relation is elevated to the form of right. But all the relations of man to man do not belong to the province of law, inasmuch as they are not all susceptible, or do not stand in need of such a determination through the rules of law. In this point of view there may be a threefold division of cases: some wholly, others not at all, others only partly, belong to the province of law, or can be governed through rules of law. For the first class, property; for the second,

friendship; for the third, marriage, can serve as examples. Marriage partly falls within, partly without, the circle of law. The nature of the family will now be more fully developed. Its constituent parts are marriage, the paternal power, and relationship. The matter of each of these relations is a relation of nature, which, as such, extends so far over the limits of human nature.

Marriage has the following effects upon the other relations of right:—The origin of the paternal power over the issue of the marriage. This is a self-existing family relation, wherein there is contained no new determination for the mutual relation of the married:—Protection against violation of this moral dignity through the institutions of criminal law:—Manifold determinations in the law of property, *e.g.*, the dowry on account of marriage.

The most, and most important of these institutions are not the immediate and necessary consequences of marriage itself, but consequent voluntary effects, the possibility of which is determined through the existence of marriage. For the law of property two objects have been already stated: Things and acts. On this is founded the twofold leading division into the law of things and the law of obligations.

For the division of property three ways are given which must not be considered in exclusive relation to each other, but may rather in great part come to be applied in practice simultaneously:—1. Community in property, and common enjoyment. This relation is found in the whole wealth of the state in whatever shape existing; for the public institutions of the state, maintained out of its revenue, are used and enjoyed by every individual, although often in different degrees. 2. Community in property, and private enjoyment. This mode of division, the least frequent, is found in the Roman Ager Publicus of the most ancient times; now, in corporations, in what we call corporate property. 3. Private property, and private enjoyment, dependent upon the free acts recognised in positive law, or in the course of nature. This mode, universally prevailing, is the only

one which we have to deal in private law with. Herein lies the conception of property, of which the complete recognition leads to the possibility of riches and poverty, both without any limitation.

The leading division of the component parts of law is founded upon their very essence or nature, namely, upon their organic connexion with the nature of man himself, in whom they inhere; and that all other qualities of the same must on the contrary appear as subordinate, and not adapted for the foundation of the entire system of law. From this flow the following relations; firstly, the object of the legal relation, or that which is immediately subject to the dominion of the will. This relation has only reality under the supposition of the dominion of the will as the characteristic foundation of the relation of right; and then the question arises, what is governed by us? It may be then admissible as a ground for a subdivision of the right of property, but not as the principle of the most philosophical division, since it does not include the family. A second relation is the position of the person holding a right against other persons; for sometimes his right is obligatory against all mankind, sometimes against determinate persons only. From this point of view the institutes of law may be thus classed: Rights against all persons, real rights and inheritance; secondly, rights against determinate individuals, the relations of family and obligations.

Herein there exists an apparent affinity between the family and obligations, whereby many have been deceived. The erroneous nature of the affinity consists in this, that in these two cases the relation between the individuals is of a nature quite different.

In obligations the question is the partial subjection of one individual to another; in the family, a natural, moral, and even legal relation unites the individuals; and the legal connexion, instead of having for its object the partial subjection of an individual, is a family connexion, which all men are bound to recognise and respect.

CHAPTER V.

CONCLUSION.

That Art is long and Time is short, has been said and sung in many languages.[1] I have attempted to give an historical review of the great writers who have scientifically cultivated Law. The general ideas of a science have been reduced to four heads :—to determine the particular object of the science; to distinguish the sciences which border on it, and to indicate the relations which it has to them ; to divide and subdivide the science thus precisely defined ; to give an historical sketch of the development of the science. These things yet remain to be done in the science of Jurisprudence.

Socrates, the first citizen of the world, commenced the Political and Ethical Philosophy of Europe. Plato preserved in writing the opinions of Socrates. Aristotle analyzed the divisions of Justice. But Despotism and Slavery corrupted the Grecian Politics.

The ancient Roman Law is displayed to us as a blending of the popular and technical elements which exist in all laws. Cicero combined the characters of the statesman and the lawyer ; and his philosophy was used in Christian Ethics by St. Augustine and other Fathers of the Church. The Civil Law of the Romans is to this day a portion of the legal life of every free citizen in Europe and America. But the consolidation of the law under Justinian shows that the development of the Roman State and People had then ceased for ever.

Six centuries after the complete Codification of the Roman Law, it began again to be cultivated in Italy. Irnerius, Accursius, and Bartolus represent the schools.

[1] Ὁ βιὸς βράχυς ἡ δὲ τέχνη μακρή.—*Hippocrates.*

The lyfe so short, the craft so long to learn.—*Chaucer.*

Ach Gott! die Kunſt iſt lang,
Und furz iſt unſer Leben.—*Goethe.*

Art is long and Time is fleeting,
And our hearts, though stout and brave,
Still, like muffled drums, are beating
Funeral marches to the grave.—*Longfellow.*

In the sixteenth century Alciatus and Cujacius established the French school of Civil Law.

Machiavelli, in Political Jurisprudence, accomplished a grander reputation ; and founded a school, which, during the sixteenth and part of the seventeenth centuries, had for its dogma the right to use fraud in politics.

Sir Thomas More introduced into Politics the spirit of Christianity, which he attested by his martyrdom.

The learned ecclesiastical jurists of the Spanish Universities, Vasquez, Victoria, Soto, Suarez, in their laborious treatises on Justice, collected the principles of Natural Law and of Politics as enounced by the Fathers and Schoolmen of the Middle Ages.

Bodin, late in the sixteenth century, appears as the first great antagonist of Machiavelli ; and in his " Republic " discusses the divisions of Politics and Laws.

With the commencement of the seventeenth century, Bacon extends the inductive method from physical to mental and political science. As such, he is the original discoverer of the principles leading to individual liberty.

Grotius treated of the topics of Civil Right in relation to those Federal and International relations which yet are imperfectly developed, but which in time will annihilate the powers of the individual governments now exercising authority over the nations of the human race.

But whilst Grotius developed his lofty theories for citizens of the world, Hobbes scientifically analyzed the lowest laws of nature ; according to which the inferior types of man always do their best to injure strangers. In managing the lowest developments of society the only possible government is a despotism.

In England, during the seventeenth century, Culverwell, Zouch, Selden, Harrington, Sidney, Cumberland, and Locke, wrote on the Law of Nature and Nations, or investigated other branches of Civil or Political Right.

Late in the seventeenth century the German School of Jurisprudence originates with Puffendorf, is illustrated by Leibnitz, and has lasted in an unbroken chain of Professors at the Universities down to our own times.

In the eighteenth century, Vico, Beccaria, and Filangieri represent the Italian school, and illustrate the Progress of Nations, Punishment, and Legislation. The Spirit of Laws is discussed by Montesquieu and the Encyclopedists. And the series of the French jurists ends with those who framed the Code Napoleon.

The Metaphysics of Law are reviewed by Kant. Some of his definitions are the best in the science of Jurisprudence.

In Prussia Stein and Hardenberg destroyed the Feudal System, emancipated the serfs, and changed them into peasant proprietors of the land.

I have treated the question of Tenant-Right as an illustration of the method of scientific inquiry into a political subject.

Bentham and Savigny, the last and greatest writers on Jurisprudence, close the series.

Sir Samuel Romilly, Sir James Mackintosh, Sir Robert Peel, and Lord Brougham, in the present century, transferred to English Legislation many of the scientific theories of Bentham.

Lord Brougham, by his individual labours has given a new impulse to the cultivation of the Social Sciences.

Several political questions of importance at present prominently agitate the societies in which they are raised.

Such are the questions of—

Union amongst the races having the same national origin and speaking the same language on the Continent of Europe,—the questions of a United Italy, a Germanic Empire, a Pansclavonic Confederation :—

Slavery in the United States of America :—

Parliamentary Reform :—

All these being decided by legislation would accomplish social results. A social result is one that manifests itself in the collective life of societies, or which affects entire categories of individuals.

Other purely legal questions are those which concern the machinery of law.

Such are—
Codification :—
Abolition of taxes on legal procedure :—
The reduction of the expenses of justice :—
The reduction of the expense attendant on the transfer of property.

The question of slavery may be treated scientifically in Europe. It scarcely can be so treated in America. Slavery in America will probably receive a great check from the immigration of the Chinese into the United States; but if the Americans are to wait until free labour by its cheapness supersede slave labour, without the intervention of Positive Law, five hundred years may roll away and slavery may still prevail.

The only method for the abolitionists to pursue is to take a lesson from history. The use of science is to teach clever men to do rapidly what ages could with difficulty accomplish by the involuntary action of mankind. The domestic and prœdial slavery of Europe gradually passed into serfdom. And in the course of many centuries, the slaves who originally were treated as mere cattle, liable to be sold to foreign masters, became bound to the soil and irremovable from the estates upon which they were born. This change at once made an improvement in the slave's condition. The slave who for his life occupies a cottage and land can accumulate and conceal property. The slave who is repeatedly during his life sold naked to a foreign master has little chance of raising his condition above the beasts of the field. Let then North America bind her slaves to the soil. No immediate injury will be thus inflicted except upon those persons who are engaged in the trade of breeding slaves for exportation. To them compensation may be awarded.

These topics may serve as illustrations of discussion in the elevated regions of science.

Largior hic campos æther et lumine vestit
Purpureo.

THE END.

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DUBLIN: Printed by ALEX. THOM & SONS, 87 & 88, Abbey-street.